Ending Justice Early in The Hague:

Legitimacy Concerns over the Unconditional Early Release of Perpetrators convicted by the International Criminal Tribunal for the Former Yugoslavia

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I confirm that the word count of this thesis is less than 100,000 words.

For my father, John Yarnell: 6th February 1945 – 13th June 2017.

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Abstract

Many scholars and observers who watched the International Criminal Tribunal for the Former Yugoslavia (ICTY) dispensing punishment for perpetrators of atrocity crimes decried what they saw as the handing down of lenient sentences for some of the most grave crimes under international law. A significant body of literature has challenged the legitimacy of the Tribunal's exercise of power in relation to this aspect of its operations. Yet, far less scrutiny has occurred in relation to another aspect of the Tribunal's operations: the premature termination of these widely perceived lenient sentences, whereby perpetrators escape one-third of their punishment.

The majority of the perpetrators convicted of atrocity crimes (54 of the 90 sentenced) were granted Unconditional Early Release (UER) by the President of the Tribunal and were thus "free as a bird" upon release. In contrast to the widespread national practice in relation to perpetrators of serious crimes released early on probation, on parole or on conditional release, perpetrators of atrocity crimes were often treated more generously, as they were released unconditionally. They were free to return to the crime scene and meet their victims, free to be greeted as heroes by welcoming crowds of supporters. These scenarios *prima facie* were an injustice to victims and potentially had societal consequences as perpetrators returned to Bosnia and Herzegovina (BiH), an ethnically-divided, post-conflict country and said they would be "happy to do it all again".

This thesis seeks to understand the causes and consequences of UER. It did so through a legitimacy framing – examining the extent to which this practice was perceived as legitimate by various groups of stakeholders and determining whether it had an overall impact on the legitimacy of the Tribunal. It has done so primarily through a legal empirical analysis of the Tribunal Presidents' early release decisions, and through 69 semi-structured interviews with inside stakeholders from the Tribunal, outside stakeholders in BiH, and one other international judge. On this basis, the thesis concludes that the Tribunal's grant of UER lacks both in terms of normative and sociological legitimacy. Nevertheless, despite this legitimacy deficit, UER has not delegitimised the Tribunal overall, rather, it has left a "blackspot" on its legacy. This thesis explains why.

List of Abbreviations

BiH ..... Bosnia and Herzegovina

CSO …… Civil Society Organisation

ICCPR …… International Covenant for Civil and Political Rights, 1966

ICTR …… International Criminal Tribunal for Rwanda

ICTR …… International Criminal Tribunal for the Former Yugoslavia

IGO …… Inter-Governmental Organisation

RPE …… Rules of Procedure and Evidence

RS ……. Republika Srpska

SV ……. Sexual Violence

UNMICT ….. United Nations Residual Mechanism for Criminal Tribunals

UNSC …….. United Nations Security Council

VA ….. Victims' Association

WCC ….. War Crimes Chamber, Bosnian State Court

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Chapter 1: Introduction

1.1. Why Unconditional Release Matters: Why this Research.

1.1.1. Perpetrators' Unconditional Early Release in International Criminal Justice

Despite being found guilty of the most egregious crimes known to mankind, 54 of the 90 perpetrators sentenced by the International Criminal Tribunal for former Yugoslavia (ICTY) were granted unconditional early release (UER) from imprisonment.[1] The majority were released after serving two-thirds of the declared sentence, effectively escaping one third of their punishment. The UER of perpetrators of large-scale crimes such as "mass killings … systematic detention and rape of women … and ethnic cleansing"[2] raises profound questions about how the international community[3] treats atrocity crimes, understood by this thesis to involve genocide, war crimes and crimes against humanity, as a category of crime. The practice *prima facie* treated these crimes with little differentiation to ordinary serious crimes, and, in fact, sometimes more generously, as perpetrators were released unconditionally.[4] It was not simply early release, but unconditional early release (UER).[5]

1.1.2. Research's Aims and Objectives

This thesis sought to understand the paradox of punishing those guilty of the most egregious crimes and their unconditional early release: why did UER happen? Interviewing insider stakeholders (those involved in, and those close to, the decisions) was required to discover the reasoning behind the practice. The thesis also sought to understand if others, in particular those people who justice was meant to serve - the population affected by those crimes (outside stakeholders) - had queried the practice. Thus, understanding the reasons for, and perceptions of, UER was the research's overall aim, in pursuit of which the following research question was asked:

> ***What was the practice and reasoning for the ICTY's grant of unconditional early release (UER), how do stakeholders perceive its legitimacy and to what extent do***

[1] As of September 2015. See UNMICT website: https://www.irmct.org/en/about/functions/enforcement-of-sentences [accessed 03/12/2019].
[2] UNSCR 827 (1993) 25 May 1993.
[3] L.D.A. Corrias and G. M. Gordon, 'Judging in the Name of Humanity: International Criminal Tribunals and Representation of the Global Public' (2015) *Journal of International Criminal Justice* 13(1): 97-112.
[4] Up until January 2019, whereby Ćorić was released after serving two-thirds of his sentence but with conditions attached, see Chapter 5, s.5.4.8. The lack of conditions attached to release was a factor emphasised by the ICTY Prosecutor but explicitly rejected from being considered by the then President Pocar, see Chapter 5, s. 5.4.1.
[5] Yet, it had relatively little scholarly attention, though some of these scholars had urged more research to be undertaken.

these perceptions impact on how these stakeholders perceive the ICTY's overall legitimacy?

To answer this overall research question, the thesis posed the following sub-questions:

1. What was the law and practice of UER at the ICTY?

2. What was the reasoning for UER at the ICTY and subsequently at its Residual Mechanism, the Mechanism for the International Criminal Tribunals (MICT)?

3. How do inside stakeholders (judges, lawyers and staff) at the ICTY and the MICT perceive the legitimacy of UER?

4. How do outside stakeholders (NGOs and CSOs working with victims of the conflict, Victims' Associations, and judges and lawyers engaged in war crimes cases) in Bosnia and Herzegovina perceive the legitimacy of UER?

5. Does UER raise broader legitimacy challenges for the ICTY and other International Criminal Tribunals?

Although the ICTY's practice raised legitimacy concerns this was not the first time perpetrators of atrocity crimes benefitted from UER at the international level. The Allied Powers responsible for the Nuremburg and Tokyo War Crimes Tribunals, 1945-1949, and 1945-1948, and subsequent regional war crimes trials had granted clemency to the majority of those convicted.[6] This clemency was via executive decisions,[7] based on political contingencies,[8] public pressure,[9] and a desire to rid the Allied Powers of the label of victors' justice.[10] In contrast, UER at the ICTY was granted through a judge (the President), in consultation with other judges who had guidance (albeit limited) on what basis to do

[6] Discounting the perpetrators who were executed all others, including those who had been sentenced to death, received a form of clemency. Clemency, Parole and Early Release was incrementally practiced by the Allied Powers and the other countries which prosecuted war crimes, often with the oversight of the Allied Powers. See: S. Wilson, 'The Sentence is Only Half the Story: From Stern Justice to Clemency for Japanese War Criminals, 1945-1958' (2015) *Journal of International Criminal Justice* 13(4): 745-761 at 747.
[7] S. Wilson, 'The Sentence is Only Half the Story: From Stern Justice to Clemency for Japanese War Criminals, 1945-1958' 745- 761.
[8] K. J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford University Press, 2011) 331-367.
[9] S. Wilson, 'The Sentence is Only Half the Story: From Stern Justice to Clemency for Japanese War Criminals, 1945-1958' 745- 761.
[10] R.H. Minear, *Victors' Justice: The Tokyo War Crimes Trial* (Princeton University Press, 1971).

so. As "judicial independence … is an important part of the legitimacy of courts",[11] one of the key tasks of the President and his or her colleagues was to ensure that neither political nor public pressure had undue influence on their decisions. The Presidents were to be guided by the overarching "interests of justice",[12] a rather vague term, which left them with broad discretion. However, Presidents were required to consider four factors in determining whether to grant an early release: the perpetrator's crimes, similarly-situated prisoners, a demonstration of rehabilitation and substantial cooperation with the Prosecutor.[13] The first part of this thesis explores the extent to which the Presidents followed this guidance and on what basis they determined that UER was appropriate for perpetrators of atrocity crimes. This question was, in part, answered through the examination of the publicly-available early release decisions.

1.1.3. This Research's Contribution to Knowledge

This judicial reasoning at this enforcement stage, in contrast to other judicial practices,[14] has attracted limited academic attention. The scholarship has analysed specific elements of the publicly-available decisions – such as how the President had considered rehabilitation.[15] Another had criticised the anomaly involved in granting UER to perpetrators who had already benefitted from a reduced sentence as a result of pleading guilty, in effect "double-counting"[16] a guilty plea. The first part of this thesis contributes to scholarship by examining the decisions holistically and from a longitudinal perspective,[17] thereby enabling an overall assessment of its normative legitimacy.

As the early release decisions gave less than a full account of the decision-making process, the research took the opportunity to obtain first-hand the reasoning applied to granting UER to perpetrators of atrocity crimes. It was important to know and understand the causes and reasons behind the practice, practically, as it was a practice set to continue (see below). It was also important at a conceptual level, to understand how stakeholders considered atrocity crimes and their perpetrators. This was achieved through conducting qualitative interviews with those who had direct

[11] M. Scheinin, H. Krunke and M. Aksenova, *Judges as Guardians of Constitutionalism and Human Rights* (Edward Elgar Publishing, 2016) at 5.
[12] ICTY Statute, Article 28 – "The President of the International Tribunal, in consultation with the judges, shall decide the matter on the basis of the interests of justice and the general principles of law".
[13] Rules and Procedure of Evidence; Rule 125 General Standards for Granting Pardon or Commutation.
[14] Such as sentencing, the consideration of guilty pleas and joint criminal enterprise.
[15] J.M. Kelder, B. Holá and J. van Wijk, 'Rehabilitation and Early Release of Perpetrators of International Crimes: A Case Study of the ICTY and ICTR' (2014) *International Criminal Law Review* 14(6): 1177-1203.
[16] J. Choi, 'Early Release in International Criminal Law' (2014) *The Yale Law Journal* 123: 1783-1784.
[17] See Chapter 2, s.2.3.1.

knowledge of the decision-making process (inside stakeholders). This is an original contribution to the field of international criminal justice scholarship.[18]

1.1.4. Perpetrators' UER and the ICTY's Stakeholders

As the law fundamentally plays a role in society,[19] including the enforcement of criminal law, an examination of the written judicial reasoning and inside stakeholders' perceptions of UER would only tell half of the story. As asserted by Garland, "punishment may be a legal institution … but it is necessarily grounded in wider patterns of knowing … and it depends upon these social roots and supports for its continuing legitimacy and operation".[20] Garland's statement refers to sociological legitimacy, that is, a "belief in an institution's right to rule".[21] Such legitimacy is highly dependent on the acts of those who administer punishment, and on occasion conclude it prematurely.

Indeed, the ICTY itself, through its judges and staff, asserted that society in the region mattered to them in their dispensation of justice: "it will be essential for the ordinary citizens of the region of the former Yugoslavia to be satisfied that justice has been achieved".[22] One important perspective which this thesis explores, therefore, is the extent to which relevant stakeholders in BiH perceived UER as having an impact on justice being achieved. This researcher believes that victims, as persons who have suffered directly as a result of the crime, are special stakeholders whose beliefs in justice matter.

There is a wealth of scholarship which has examined the ICTY's engagement with its stakeholders in the region (including BiH) and assessed its sociological legitimacy.[23] Of most relevance for this thesis are assessments of how the ICTY communicated its exercise of power, for example, indictments, trials and sentencing, to its stakeholders. As articulated by Kress and Sluiter, the enforcement of international criminal justice should form part of its legitimacy assessment.[24] This thesis expands this field of scholarship as it explores particular stakeholders' perceptions of the premature termination

[18] This element of the thesis is the belief in its legitimacy from one set of stakeholders – the insiders at the Tribunal.
[19] A. Barak, 'On Judging' in M. Scheinin, H. Krunke and M. Aksenova (eds.) *Judges as Guardians of Constitutionalism and Human Rights* (Edward Elgar Publishing, 2016) at 47.
[20] D. Garland, *Punishment and Modern Society: A Study in Social Theory* (Clarendon Press, 1999) at 21.
[21] A. Buchanan and R. O. Keohane, 'The Legitimacy of Global Governance Institutions' in L. H. Meyer (ed.) *Legitimacy, Justice and Public International Law* (Cambridge University Press, 2009). See Chapter 3, s.3.3.
[22] ICTY Annual Report, 2000, para. 195.
[23] See Chapter 4, s.4.3.
[24] C. Kress and G. Sluiter, 'Enforcement: Preliminary Remarks' in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.) *The Rome Statute of International Criminal Court: A Commentary* (Oxford University Press, 2002) 1751–1756 at 1753, cited in B. Holá and J. van Wijk 'Life after Conviction at International Criminal Tribunals An Empirical Overview' (2014) *Journal of International Criminal Justice* 12(1): 109-132 at 110.

of punishment. It thus contributes to the gap in scholarly assessments of international criminal justice's legitimacy: enforcement's early ending.

1.1.5. Significance of this Research

This research was not simply retrospective; it has a practical purpose. The ICTY's grant of UER is not a unique phenomenon; rather, it set the precedent for UER at two-thirds at its sister Tribunal, the ICTR.[25] Furthermore, the permanent International Criminal Court has a similar practice whereby perpetrators' sentences are reduced;[26] they too are free to leave prison with no conditions attached. Therefore, UER is a live issue. Although this thesis is an in-depth case study of one International Criminal Tribunal (ICT), the ICTY and one of the societies UER had an effect on, BiH, it has highlighted legitimacy deficits of relevance to any future ICTs, for example: the sociological legitimacy deficits caused by lack of communication and transparency, the normative legitimacy deficit arising from the practice of broad discretion held by one individual coupled with a lack of clear guidelines. Identifying these legitimacy deficits, the thesis makes recommendations: fundamentally the application of clear and consistent reasoning for early release from imprisonment and better communication of that reasoning to the people whose lives the practice affects.

1.2. Terminology

The thesis refers to "perpetrators" of atrocity crimes rather than "convicted persons" or "prisoners", which were terms often used by stakeholders at The Hague and the judges in BiH. This is a conscious decision to emphasise their distinct nature;[27] they have perpetrated the most egregious crimes, which "in contrast to all criminal guilt, oversteps and shatters any and all legal systems".[28] This distinction is also emphasised by the use of the term "atrocity crimes" rather than "international crimes". Other international crimes exist, such as piracy and terrorism. "Atrocity crimes" is used to

[25] Although the ICTR had granted an UER for one perpetrator in 2011 (Bagaragaza) it had granted UER at three-quarters of the sentence rather than two-thirds. The ICTR, like the ICTY, was established by the UNSC under Chapter VII. When the majority of those indicted by the respective Tribunals had been convicted in the first instance, the UNSC used its powers to close the ICTR and bring the enforcement of its sentences under an umbrella Residual Mechanism to administer the enforcement of final sentences and any retrials. This gave rise to the President of the Residual Mechanism determining that those convicted by the ICTR would benefit from the criminal law principle of *lex mitor* in reading the "similarly-situated prisoners" guidance, and determined that perpetrators convicted by the ICTR were to be considered as similarly-situated to ICTY perpetrators. Thus, ICTR perpetrators now were eligible for UER at two-thirds rather than three-quarters; see: Bisengimana, Early Release Decision, 11 December 2012, para. 17.

[26] ICC Rule and Procedure of Evidence, Rules 224 and 225: Review concerning reduction of sentence under Article 110, although these rules provide much clearer guidelines for the Judges to consider.

[27] A. Smeulers, M. Weerdesteijn and B. Holá, *Perpetrators of International Crimes: Theories, Methods, and Evidence* (Oxford University Press, 2019) at 5.

[28] H. Arendt, 'Letter to Karl Jaspers of 17 August 1946', in *Hannah Arendt and Karl Jaspers, Correspondence*, 1926-1969 cited in M. Drumbl, *Atrocity, Crime and Punishment* (Cambridge University Press, 2007) at 156-157.

reiterate their magnitude and distinct characteristic:[29] mass victimisation, mass participation or complicity, and their motive – often based on hatred of another.

"Victims" are also described as such rather than "survivors", based on the legal framing. Although the living victim is also a survivor they are under the law, victims of a crime. They testify as victim-witnesses, which is how they are referenced under the Statute. Further, in addition to The Hague, "victims" was overwhelmingly how victims were described in BiH.

The ICTY and its Residual Mechanism are frequently referred to as The Tribunal as the majority of interviewees in BiH referred to the ICTY as "The Hague Tribunal". Many of the stakeholders in BiH were unaware that the Residual Mechanism dealt with perpetrators' applications for early release.

1.3. Structure of the Thesis

Chapter 2 outlines the methods used and why they were chosen to answer this research question. Chapter 3 explains why the legitimacy frame was used to explore the Tribunal's UER. The legitimacy frame was chosen as it enabled a holistic understanding of UER: the application of the law itself and the impact of the practice upon society. The chapter further clarifies the stakeholders for whom this perception of legitimacy of UER mattered. Chapter 4 outlines the relevant areas of international criminal justice scholarship which have explored the ICTY's exercise of power, given that the Presidents' grant of UER is another exercise of power. Two specific areas are examined. First, the scholarship which has scrutinised ICTY's judicial practices, the normative legitimacy of the Tribunal's exercise of power. As UER does not happen in isolation, people in the region view UER and often experience it directly as perpetrators return to the region; consequently, the second area of scholarship, the Tribunal's sociological legitimacy, is examined through scholarship which has explored stakeholders' perceptions of the Tribunal in the region and asked why these perceptions were held. Chapter 4 begins however by addressing the specific nature of the ICTY, namely as an ICT physically and culturally removed from one of its core stakeholders, the society which experienced the crimes adjudicated. It is important to do so as these characteristics are shared by other ICTs and the ICC, which may grant early release to perpetrators of atrocity crimes.

[29] D. Scheffer, 'Genocide and Atrocity Crimes' (2006) *Genocide Studies and Prevention* 1(3): 229-250; D. Scheffer "The Merits of Unifying Terms: 'Atrocity Crimes' and 'Atrocity Law' (2007) *Genocide Studies and Prevention* 2(1): 91-96; and see UN 'Framework for Analysis of Atrocity Crimes: A Tool for Prevention' 2014, noting that "Atrocity crimes take place on a large scale, and are not spontaneous or isolated events; they are processes, with histories, precursors and triggering factors which, combined, enable their commission" at 14.

Chapters 5, 6, 7 and 8 detail the findings of the research, the analysis of the empirical legal research and the semi-structured interviews. Chapter 5 discusses the normative legitimacy deficits of UER and outlines how the practice evolved. Through an analysis of the law and the early release decisions, the chapter demonstrates how UER was foreseen as an exception but became the standard. This was primarily due to the Presidents adopting a *stare decisis*[30] approach, coupled with the Presidents' reading of the law and other documents in favour of the perpetrator. This included how the Presidents considered evidence of perpetrators' demonstration of rehabilitation. As argued above, perpetrators of atrocity crimes have committed crimes of a particularly grievous nature which were part of societal atrocities. As perpetrators were often due to return to the society concerned, the Presidents' assessment of perpetrators' rehabilitation was key.

Chapter 6 focuses on this particular legitimacy deficit of UER, the Presidents' assessment of perpetrators' demonstration of rehabilitation. The legitimacy deficit was attributed to a perceived inappropriate determination of what rehabilitation for perpetrators of atrocity crimes entails. Fundamentally, the legitimacy deficit was based on the unique nature of atrocity crimes: their motivation, their perpetrators, and the context of return. Thus, the chapter does not engage with the general challenges of determining rehabilitation for perpetrators of ordinary crimes, whatever their gravity, as their nature and circumstances of return are so different. This unique nature of atrocity crimes gives rise to a distinct purpose of punishment - that is, moral condemnation, which is affected when this punishment is terminated early. This purpose of punishment and the impact of UER on that purpose is detailed in Chapter 7. This chapter also discusses how UER had repercussions in BiH as the President appears to have neglected the purpose of punishment as he granted UER. Chapter 8 discusses the impact of UER on a key stakeholder in the international criminal justice system, the victims. It begins by reiterating that victims are a key stakeholder and identifies, through the thesis' qualitative interviews in The Hague, why they were overlooked at this stage. The chapter identifies what can be done for victims, countering the widespread sense that victims will never be satisfied with the outcome of criminal justice.

Chapter 8 continues to answer the broader question of whether UER had an impact on BiH's stakeholders' overall perception of the ICTY's legitimacy, and in doing so it highlights the context in BiH. This context goes some way to explain why UER, although widely perceived as an illegitimate practice, did not, for the vast majority of stakeholders undermine the overall legitimacy of the Tribunal. Chapter 9 sets out this research's contribution to scholarship. It also recognises the thesis'

[30] The judicial practice of following precedent.

limitations, the different approaches that could have been taken, and identifies future areas of research. It concludes by summarising the most important findings of relevance to international criminal justice more broadly.

Chapter 2: Methodology

2.1. Introduction

This chapter discusses the methodology adopted in this thesis. It starts by setting out the researcher's positionality, which explains the thesis' aim and objectives (s.2.2). The chapter outlines and explains how and why a qualitative socio-legal methodology was adopted to achieve these aims and objectives (s.2.3). The ethical issues associated with the fieldwork, the specific challenges which arose during the research period and how these challenges were dealt with, are highlighted, and reflected upon (s.2.4). The Chapter recognises the limitations of the study and highlights its strengths (s.2.5).

2.2. Why this Research: Researcher's Positionality

The researcher's position is that law and institutions of law do not operate in a vacuum[1] and that the law should serve the society which it affects.[2] An examination of the law, therefore, should be undertaken in its societal context.[3] As other scholars have advised, a point with which this thesis agrees, legal researchers should not "ignore social and political reality"[4] around the law. Therefore, in addition to understanding the law and practice of UER itself, the thesis sought to understand the extent to which social reality in particular can impact on how relevant stakeholders perceive the legitimacy of the law's operationalisation (s.2.3.3). Further, a holistic approach, an understanding of the society within which it operates, is required as international criminal law (ICL) does not have, or has limited, coercive power in order to operate;[5] its operation to an extent, therefore, depends on sociological legitimacy – that is, the "belief in the institution's right to rule" and its ongoing right to rule.[6] Sociological legitimacy relates to the beliefs held by its multiple stakeholders (Chapter 3, s.3.6), those who shape the law and those whose lives are affected by its operations and decisions. With these overarching values the thesis sought to understand how the practice of UER happened (how it was operationalised), how stakeholders perceived this practice and the impact the practice had on their overall perceptions of the institution, the ICTY.

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[1] M. Aksenova, E. van Sliedrget and S. Parmentier, *Breaking the Cycle of Mass Atrocities: Criminological and Socio-Legal Approaches in International Criminal Law*, (Hart, 2019) at 24.

[2] A. Barak, 'On Judging' – 'the law, as a normative system, has a role in society. It is intended to ensure functional social life. It contains order and security alongside justice and morals" in M. Scheinin, H. Krunke and M. Aksenova (eds.) *Judges as Guardians of Constitutionalism and Human Rights* (Edward Elgar Publishing, 2016) at 47.

[3] D. Feenan (ed.) *Exploring the 'Socio' of Socio-Legal Studies* (Palgrave Macmillan, 2013) at 6.

[4] M. Aksenova, E. van Sliedrget and S. Parmentier, *Breaking the Cycle of Mass Atrocities: Criminological and Socio-Legal Approaches in International Criminal Law*, (Hart, 2019) at 24.

[5] M. Aksenova, E. van Sliedrget and S. Parmentier, Breaking the Cycle of Mass Atrocities: Criminological and Socio-Legal Approaches in International Criminal Law, (Hart, 2019) at 24.

[6] A. Buchanan and R. O. Keohane, 'The Legitimacy of Global Governance Institutions' in L. H. Meyer (ed.) *Legitimacy, Justice and Public International Law* (Cambridge University Press, 2009) at 29. See Chapter 3, s.3.3.

A legitimacy frame was used, outlined in Chapter 3, broadly drawing on Beetham's framework: "for power to be fully legitimate … three conditions are required: its conformity to established rules; the justifiability of these rules by reference to shared beliefs; and the express consent of the subordinate".[7] Within Beetham's framing other understandings of legitimacy were analysed, used and applied. Nevertheless, Beetham's broad framework allowed the practice of UER to be studied in context, as it captured the two elements of normative legitimacy (legality – rules and a moral core - beliefs) and the sociological legitimacy (consent) understood here as "acceptance"[8] under Beetham's 2013 clarification of his 1991 framework. Obtaining an understanding of the concepts of legitimacy allowed the qualitative research to enhance these understandings in relation to UER. As noted by Geertz, "although one starts at thick description ... from a state of general bewilderment [one does] not start (or ought not) intellectually empty-handed".[9]

Additionally, a legitimacy frame was used as it allowed this research to contribute to the existing scholarship on international criminal justice, and specifically the ICTY. As noted by Aksenova, "there is ongoing critical discussion in scholarly and professional circles of the legitimacy of international courts and international justice".[10] Therefore, a literature review was undertaken to study these critiques primarily concerning, although not limited to, the ICTY's exercise of power (Chapter 4). This frame was logical also because UER was and is an exercise of the ICTY's power. It is also recognised here that the study of international criminal law (and justice) is not "merely a field of study" but often "advocacy for international criminal law".[11] As a consequence, a large body of this literature often positions itself in a legitimacy frame, critiquing practice and proposing recommendations based on these critiques – which this thesis does (Chapter 5, s.5.5, Chapter 6, s.6.7, Chapter 8, s.8.6). Therefore, this thesis contributes to this advocacy. Based on the research findings, the thesis advocates for reform to the UER practice in order to be perceived as legitimate (as possible) by its stakeholders. Other areas of literature reviewed included the purposes of punishment (outlined in Chapter 7), given that UER was a premature termination of this. Chapter 7 details how one specific purpose was perceived as fitting for atrocity crimes and subsequently negated at UER. Additionally,

[7] D. Beetham, *The Legitimation of Power* (Macmillan, 2nd edition, 2013).
[8] See D. Beetham 'Revisiting Legitimacy, Twenty Years On' in *Legitimacy and Criminal Justice: An International Exploration, in* J. Tankebe and A. Liebling (eds.) *Legitimacy and Criminal Justice: An International Exploration* (Oxford University Press, 2013) at 20.
[9] C. Geertz, 'Thick Descriptions: Towards an Interpretative Theory of Culture' in C. Geertz (ed.) *The Interpretation of Cultures: Selected Essays* (Fontana Press, 1993) at 27.
[10] M. Aksenova, E. van Sliedrget and S. Parmentier, *Breaking the Cycle of Mass Atrocities: Criminological and Socio-Legal Approaches in International Criminal Law,* (Hart, 2019), 23 citing an example of M. Scheinin, H Krunke and M Aksenova (eds.) *Judges and Guardians of Constitutionalism and Human Rights* (Edward Elgar Publishing, 2016).
[11] S.M.H Nouwen, 'As you Set out for Ithaka': Practical, Epistemological, Ethical, and Existential Questions about Socio-Legal Empirical Research in Conflict' (2014) *Leiden Journal of International Law* 27(1): 227-260 at 229.

literature on rehabilitation and the notion of remorse was undertaken as the ICTY's Rules and Procedure of Evidence (RPE) obliged the President to consider the perpetrator's demonstration of rehabilitation in determining a grant of release. This review incorporated stakeholders' perceptions of this factor as well as the Presidents' consideration of rehabilitation, Chapter 6.[12]

2.3. Methods Used: Why and How

To achieve the objectives of this thesis, as the researcher wished to understand the law's implementation within its social reality,[13] a socio-legal approach was adopted. It undertook what Kagan labelled three socio-legal "research agendas". [14] That is, the research examined: first, what factors shaped the law and their design; second, the legal process and how the decisions were made; and third, the effects of the legal processes.[15]

In relation to understanding the practice of UER, [16] desk-based research was undertaken. This entailed the first two of Kagan's research agendas of what shaped the law on UER, the legal process and how the UER decisions were made. It consisted of an analysis of two sets of documents: doctrinal analysis of the Statute, the Rules and Procedure of Evidence and the *Travaux Préparatoires*, and empirical legal research of the process of UER and how the early release decisions were made. Finally, in relation to the effects of UER and identifying and understanding perceptions of it, [17] corresponding to Kagan's third research agenda, the thesis undertook a qualitative approach involving primarily semi-structured interviews.[18]

2.3.1. Document Analysis

Legality is a core criterion of legitimacy,[19] thus doctrinal analysis of the black letter law on early release was first examined: the Statute, its Rules and Procedure of Evidence (RPE), and Practice Direction. The research further examined the law's intention by examining the *Travaux Préparatoires*. Second, the law in practice was examined, that is, the application of these RPE through the analysis of the early release decisions. This document analysis is empirical as its analysis

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[12] ICTY Rules and Procedure of Evidence, Rule 125.
[13] D. Cowen, S. Halliday and C. Hunter, 'Adjudicating the Implementation of Homelesses Law: The Promise of Socio-Legal Studies' (2006) *Housing Studies* 21:3, 381-400, at 383.
[14] R. A. Kagan, 'What Socio-Legal Scholars Should do When There is Too Much Law to Study' (1995) *Journal of Law and Society* 22(1) at 143-144.
[15] R. A. Kagan, 'What Socio-Legal Scholars Should do When There is Too Much Law to Study' at 143.
[16] Sub- Research Questions 1 and 2.
[17] Sub Research Questions 3 and 4.
[18] R.A. Kagan, 'What Socio-Legal Scholars Should do When There is Too Much Law to Study' (1995) *Journal of Law and Society* 22(1) at 144.
[19] Beetham's first factors, exercise of power according to rules.

focuses on the stated reasons for UER. The ICTY's RPE obliged the President to consider four factors in their determination as to whether to grant a pardon or commutation of sentence to a perpetrator: the gravity of [the prisoner's] crime, any substantial cooperation with the prosecutor, similarly-situated prisoners, and evidence of demonstration of rehabilitation.[20] The Statute guided the President to decide this on the basis of the "interests of justice" and "general principles of law".[21]

The thesis examines early release decisions including decisions that deny early release. The decisions were collated and systematically analysed in an Excel spreadsheet. This provided a text analysis[22] of decisions. This database answered the second sub-question of the thesis: What is the legal reasoning for the grant of unconditional early release at the ICTY, and, subsequently, the MICT? Systematically recording these details, the database provides an empirical record as to which factors were considered in most detail, the scope of matters considered as evidence of particular factors (such as the perpetrator's "substantial cooperation with the Prosecutor" and "evidence of their demonstration of rehabilitation").[23] These factors were examined in the interviews, obtaining stakeholders' perceptions of these reasons (s.2.4.1).

Trial judgments, and, where applicable, the Appeal Chamber judgments, of those granted UER were examined and relevant details recorded in the database. The analysis examined, *inter alia*, Choi's assertions (see Chapter 5, s.5.4.3) that Tribunal Presidents had erred in "double-counting"[24] factors such as a guilty plea at the sentencing stage and again at early release. Additionally, some judgments set out the purposes of sentencing which were analysed against the early release decision to examine the extent to which the stated purposes of sentencing were realised or not as the President granted early release. Other details were recorded to garner both the specificities of the perpetrator and the bigger picture, the context and the practicalities of early release. These included: the typology of the perpetrators;[25] the crimes charged with and convicted of;[26] plea agreements;[27] initial sentences and appeals; the length of the incarceration; evidence provided by the enforcement state;[28] the views of other judges consulted in the decision-making process (where stated); whether

[20] Rules and Procedure of Evidence, Rule 125.
[21] ICTY Statute, Article 28.
[22] N. Fairclough, *Analysing Discourse: Textual Analysis for Social Research* (Routledge, 2003).
[23] ICTY Rules and Procedure of Evidence, Rule 125.
[24] J. Choi, 'Early Release in International Criminal Law' (2014) *The Yale Law Journal* 123: 1783-1784 at 1784.
[25] Typology: direct or indirect perpetrator, military/civilian or political; low, mid or high-level perpetrators.
[26] Categories of Genocide, crimes against humanity, and war crimes; specific crimes such as murder, rape or torture.
[27] Plea agreements including whether charges were dropped and whether any obligations were placed upon the perpetrator.
[28] Such as a psychologist report, prison report on behaviour and prison or state recommendations on release.

the decisions were made public and the timing of this; the statutory factors considered, other perpetrator-related factors,[29] any stated legal principles; other considerations[30] and the circumstances surrounding the crime.[31]

The database also provided a record of how these decisions evolved over time. For example, the more time progressed, the more detailed the decisions became. This longitudinal record indicated how the procedure of early release evolved, a unique contribution to scholars' assessment of the practice, focused primarily on the Presidents' consideration of perpetrators' rehabilitation.[32]

The database details the law in action: both its practice and reasoning.[33] The database, recording not only numerically, but *verbatim*, captured the principles that the Presidents had applied in their reasoning to grant or deny early release. The most detailed factor was that of the perpetrator's demonstration of rehabilitation, and, therefore, the reasoning applied to this factor was examined in detail. The bases of the Presidents' determinations were set out in the database. The Presidents' reasoning (when stated) included a perpetrator's: surrender to the Tribunal; guilty plea; activities undertaken in prison; reflections on their crimes; attitude to staff; attitude towards other prisoners; prospects of resettlement; job prospects upon release; age; health; and family ties.[34] As many of these reasons are "value judgements"[35] made by the President, they beg the question of whether these bases are actually considered as rehabilitation by other stakeholders. Therefore, the question on what constitutes sound bases for a demonstration of rehabilitation was part of the interview template, to examine the extent to which stakeholders may identify with the Presidents' bases of rehabilitation. Chapter 6 discusses these findings and debates around this area of the Presidents' decision-making.

Additionally, the database identified the dominant practice that had, at least on the black letter of Presidential decisions, been applied, namely, that the "similarly-situated prisoners" had been determinative to grant perpetrators' UER, noted by Choi, Merrylees and Holá et al. As the research

[29] Perpetrator related -such as age, ill-health, family-ties.
[30] Considerations such as victims, the community upon return.
[31] The extent to which the crimes were committed as part of a wider-strategy, ethnicity etc.
[32] See Chapter 4, s.4.5, J. Choi, B. Holá et al, A. Merrylees.
[33] See similar approaches: Swisspeace and Oxford Transitional Justice Research, *Transitional Justice Methods Manual: An Exchange on Researching and Assessing Transitional Justice* (Swisspeace, 2013) noting that database can provide an "analysis of the principles underpinning the law … examining whether these principles can be morally justified and if they are realised in the application of the law" at 25.
[34] See Chapter 6, s.6.6.
[35] See Chapter 3, s. 3.5: T. Treves, 'Aspects of Legitimacy of Decisions of International Courts and Tribunals' in R. Wolfrum and V. Roben (eds.) *Legitimacy in International Law* (Springer, 2008) at 170.

question sought to understand perceptions of legitimacy, how this factor should be considered was raised in the interview template.

2.3.2. Analysis of the Tribunal's Non-Legal Materials

Other documents of the ICTY were also examined. This examination enabled the contextualisation of these decisions, of how the ICTY communicated its early release decisions (or not). These documents included: the Tribunal's Annual Reports (ARs); speeches by the President and the Prosecutor to the UNSC in submitting the ARs; speeches made in the region and at international conferences by ICTY judges, prosecutors and staff, and articles they had published in special editions of academic journals;[36] press releases issued by the Tribunal, and records of Questions and Answers at conferences organised by the Tribunal.[37] These documents "represent[ed] a specific version of realities",[38] that is, how the ICTY represented itself and its purposes to its stakeholders. Analysis of these documents informed the semi-structured interviews, as interviewees were often asked, as follow-ups to the interview questions, about the Tribunal's general outreach and specific instances of notable practices.[39] Examining these documents indicated a *prima facie* lack of priority that the Tribunal afforded to communicate the decisions. The researcher also kept abreast of the current communication by the Tribunal. Regular checks of the Court Records on any Presidents' decisions on early release were undertaken, which were not widely communicated but, nevertheless, publicly available. This matter was raised with stakeholders in The Hague – was there a reason as to why these decisions were not communicated consistently to the region?

Alongside these accounts, the Tribunal's bilateral agreements with enforcement states (where the perpetrators served their sentences) were examined; what specific terms had been agreed between the Tribunal and enforcement states as to how they would detain perpetrators of atrocity crimes in their domestic prisons, and under what circumstances they would not detain them. Additionally, the penal laws and policies relating to prisoner release of these countries were examined, via the EU portal.[40] This review checked details such as: whether the country had specific penal law and sentencing for atrocity crimes; maximum and minimum sentences available for serious crimes;

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[36] See: Special Issue: 'The ICTY Ten Years On' (2004) *Journal of International Criminal Justice* 2(2), with the majority of contributions written by staff and judges at the ICTY.

[37] See ICTY website: 'From 2010 onwards, with attention paid to the legacy of the ICTY steadily rising, a series of conferences were convened to stimulate stakeholder discussions on the Tribunal's impact in the former Yugoslavia and on the global scene … The events took place in The Hague in 2010 and 2011, in Zagreb in 2012, and in Sarajevo in 2012 and 2013'. See: https://www.icty.org/en/features/legacy-conferences [accessed 29/01/2020].

[38] U. Flick, *An Introduction to Qualitative Research* (Sage, 6th edition, 2018) at 357.

[39] For example the ICTY 2000 Annual Report noted the reasons why Outreach Offices were established in the region, and some interviewees were asked about this when particular positions were taken, such as that the ICTY's sole purpose was to prosecute and trial perpetrators.

[40] See: https://e-justice.europa.eu/content_member_state_law-6-en.do [accessed 02/12/2019].

whether life sentences were available; minimum and maximum incarceration time for specific crimes; policies on prisoner release (usually parole or release on probation), rehabilitation programmes and requirements for prisoners to be considered for release, and any policies that existed relating to victims' right to information and protection at the release stage. This review allowed the UER to be put in the context of perpetrators' setting – as it was the national law of the enforcement state which was the trigger for the President to consider a perpetrator's release – under the Statute.[41] The agreements did not state whether enforcement states had particular penal law relating to perpetrators of atrocity crimes or any specific measures relating to typologies of perpetrators which could be drawn upon. It was important to determine whether this had been the case as it may have influenced the Presidents' decision-making process, given the paucity of precedent they had to draw upon as the first international criminal tribunal with a provision explicitly enabling a perpetrator not to serve their full sentence.[42]

2.3.3. Understanding the Social Context of UER in BiH

As the second set of sub-questions (3, 4 and 5) of the overall research question examines the perceptions of legitimacy of the practice, it was important to put these perceptions in their context. As a socio-legal study it seeks to understand a practice in its social-setting;[43] it was, thus, important for this research to obtain an understanding of the social context itself.[44] Therefore, news coverage examining national responses of UER was assessed and monitored over the course of the PhD.[45] The examination was limited to sources tailored for the non-local audience. This assessment of the coverage indicated that relatively little attention had been paid and that reporting was rather matter-of-fact.[46] The routine nature of media and international legal coverage suggested that there was a lack of interest, at least in the international sphere. The extent to which this was the case in the regional sphere was not known, and the question was therefore added to the research instrument. After the fieldwork, Bosnian media coverage of, and political reactions to, early release

[41] Article 28 of the ICTY Statute provides that "pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal accordingly".
[42] Article 28 of the Statute.
[43] N. Golafshani 'Understanding Reliability and Validity in Qualitative Research' (2005) *The Qualitative Report* 8(4) citing M. Patton, *Qualitative evaluation and research methods* (Sage, 3rd edition, 2002) at 14.
[44] N. Wamai, 'Frist Contact with the Field: Experiences of an Early Career Researcher in the Context of National and International Politics in Kenya' (2014) *Journal of Human Rights Practice* 6(2): 213.
[45] Primarily through BIRN. Daily news reports were received from BIRN and weekly news reports from Free Radio Europe (Free Radio Europe was a round-up of other news sources, such as Al Jazeera, the BBC and regional news stations). Blog-posts such as the International Crimes Database and *Opinio Juris* were also examined.
[46] For journalist-NGO interviewee comment on how she "had to" report. Interview, NGO, Sarajevo, BiH, 27/10/2017. Early Release decision usually reports factually the name of the perpetrators being released at two-thirds of their sentence.

were examined by a local consultant.[47] Although it was retrospective, this locally-sourced data provided an added layer of rigour to the overall research, obtaining the views of not only Western and Western-sponsored media and international organisations but indicated how the national and local communities popularly viewed UER. Additionally, in December 2018, a special edition of the International Criminal Justice Review (ICJR) was published. The articles focused on the homecomings of those trialled before the ICTY.[48] These articles primarily analysed the personality of the perpetrators, the high level of denialism and the role of the media and political parties in organising their welcoming receptions. The consultant's review and the academic analysis of the homecomings received by those returning from The Hague (ICJR special edition) confirmed the interview data, and the literature asserting that perceptions of the Tribunal in BiH are significantly influenced by political-ethnic elites.

The routine monitoring of the Balkans Transitional Justice news and other NGOs and IGOs reports[49] allowed the researcher, to the greatest extent possible, to be up-to-date with the pertinent legacies of atrocity crimes in the region. These included issues related to war crimes prosecution, and ethnic and post-conflict matters, which provided a deeper understanding of the bigger picture, in which early release occurred. This material was not a major source of information; rather the ongoing review enabled a broader understanding of the post-conflict society of BiH, which forms the context in which early release occurs and stakeholders' perceptions are affected.

2.4. Fieldwork and Interviews

A total of 69 semi-structured interviews were conducted: 17 interviews with stakeholders in The Hague[50] and 51 with stakeholders in BiH in 2017.[51] In 2018, a further two interviews were conducted. One Tribunal judge was interviewed in Paris, September 2018, and one judge serving at an International Criminal Tribunal was interviewed in Northern Ireland in November 2018. The

[47] Money from the university was obtained after the fieldwork was conducted but the consultant tracked media coverage from the time of the 54 early releases.
[48] 'Special Issue: ICTY Celebrities: War Criminals Coming Home' (2018) *International Criminal Justice Review:* 28(4).
[49] For example, reports from NGOs such as TRIAL International, Amnesty International, International Crisis Group, Helsinki Watch were researched and monitored for the same purposes. Other sources were researched such as the EU's Office of the High Representative; the OSCE, the UNDP, UN Treaty Body Monitoring Mechanisms and the International Review of the Red Cross' National Humanitarian Biannual Update on National Legislation and Caselaw.
[50] In January – February 2017 two weeks were spent in The Hague, 17 interviews were conducted. One interview was conducted with an UNMICT judge in September 2018.
[51] See Annex II for the full list of interviews. One of these BiH interviews were conducted over skype in January 2018, but listed here for ease of reference.

thesis' methodology took an "actor-orientated"[52] approach, which calls for socio-legal research to be undertaken in a manner which recognises the agency of those people whose lives are affected by outside forces.[53] Thus, semi-structured interviews were conducted and as far as possible, interviewees' words are cited *verbatim.* The actor-orientated approach further calls for "evaluation of legal principles in terms of their concrete effects in a social setting, rather than in terms of the conceptual coherence of abstract principles."[54] This was implemented by familiarisation with the context of BiH, for interviewees to choose the location of the interview. This approach also draws upon the principles of critical victimology[55] which also seeks "to capture … the lived realities of human beings"[56] and, therefore, "examine the wider social context" of victims.[57] Thus, a large part of the findings chapters discusses the context within which these perceptions of UER's legitimacy is formulated. The approach taken by critical victimology further seeks to understand not only the wider social context but its origins, "the processes … which remain hidden".[58] For the purposes of this thesis this meant finding and listening to the voices of those with first-hand knowledge of UER, stakeholders in The Hague.

Following this, the thesis sought to understand both perspectives, those with first-hand knowledge of the abstract principles which informed UER (the stakeholders in The Hague) and those whose lives they may impact, such as stakeholders in post-conflict BiH. It also recognised that the two sets of stakeholders, insiders (The Hague interviewees) and outsiders (interviewees in BiH), are not homogeneous, therefore, multiple stakeholders within those groups were identified for a multi-level approach (seniority and a range of professions). Obtaining a range of stakeholders' perceptions as to the legitimacy of the practice of and reasoning for UER offered the possibility of illuminating

[52] N. Long, 'From Paradigm Lost to Paradigm Regained? The case for an Actor-orientated Sociology of Development' (1990) *European Review of Latin American and Caribbean Studies* 49 and more recently, C. Nyamu-Musembi, 'Towards an actor-orientated perspective on human rights' *IDS Working Paper* 169 (Institute for Development Studies, 2002).
[53] N. Long, 'From Paradigm Lost to Paradigm Regained? The case for an Actor-orientated Sociology of Development' (1990) *European Review of Latin American and Caribbean Studies* r 49: 6.
[54] C. Nyamu-Musembi, 'Towards an actor-orientated perspective on human rights' *IDS Working Paper* 169 (Institute for Development Studies, 2002) at 2 referencing J. Singer, 'Property and coercion in federal Indian Law: the conflict between critical and complacent pragmatism'; M. Rabin, 'The pragmatist and the feminist'; M. Matsuda, 'Pragmatism modified and the false consciousness problem'; M. Minow and now E. Spelman, 'In context' – all in *Southern California Law Review* (1990).
[55] D. Rothe and D. Kauzlarich, *Towards a Victimology of State Crime* (Routledge, 2014); L. Wolhuter, N. Olley and D. Denham, *Victimology, Victimisation and Victims' Rights*, (Routledge-Cavendish, 2009); D. Kauzlarich, R.A. Matthews and W.J. Millers 'Toward a Victimology of State Crime' *Critical Criminology* (2001) 10: 173; M. Maguire and J. Pointing (eds.) *Victims of Crime, A New Deal?* (Open University Press, 1988) and I. Mawby and S. Walklate (eds.) C*ritical Victimology: International Perspectives* (Sage, 1998).
[56] I. Mawby and S. Walklate (eds.) C*ritical Victimology: International Perspectives* (Sage, 1998) at 19.
[57] I. Mawby and S. Walklate (eds.) C*ritical Victimology: International Perspectives* (Sage, 1998) at 21.
[58] I. Mawby and S. Walklate (eds.) C*ritical Victimology: International Perspectives* (Sage, 1998) at 19.

commonalities (shared beliefs)[59] as to what these stakeholders perceived as illegitimate or legitimate practices and/or the stated reasons for UER – the final sub-research question.

To gain an understanding of stakeholders' perceptions of UER, and in the case of BiH the extent to which this had had an impact on their overall perception of the Tribunal's legitimacy, a semi-structured interview model was adopted. This meant that interviewees were able to outline their perceptions in their own words, and on their own terms.[60] Further, in the case of BiH participants were provided with information[61] regarding the stated reasons for early release, which had not been known to many of them. Semi-structured interviews are fluid and flexible.[62] Open-ended questions allowed the research to give voice to interviewees and allow new insights to emerge, which would not be available with pre-defined answers listed in a survey.[63] Additionally, "specific follow-up questions emerge as the interview unfolds"[64] which allowed the researcher to tease out further reasoning and to enable views to be clarified, thus providing a deeper understanding of interviewees' opinions. Finally, although the thesis provides an analysis of the interviews, stakeholders' views are seen directly, quoted largely in their own words, in order to give voice to them.[65]

2.4.1. Interviews with Stakeholders in The Hague

In The Hague, 17 interviews were conducted,[66] across all three organs of the Tribunal: the Chambers, The Registry and the Office of the Prosecutor (OTP).[67] This range of stakeholders is representative of those who are agents of the system, from the decision-makers to those who administer and represent the system.[68] Of the Chambers seven judges were interviewed and two staff of the President's Office. One senior staff member of the OTP was interviewed.[69] Six staff from the Registry

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[59] Beetham's second required element of a legitimate exercise of power – that the power holder and the subordinate have shared beliefs as to the justifiability of the rules.
[60] Surveys can obtain a wide scope of opinions, these are pre-defined and therefore are subjective themselves.
[61] Nouwen has noted the value of semi-structured interviews whereby the "researcher engages in a dialogue and also answers the interviewees' questions ... in an attempt to avoid purely extractive research" see S.M.H Nouwen 'As you Set out for Ithaka': Practical, Epistemological, Ethical, and Existential Questions about Socio-Legal Empirical Research in Conflict' at 246.
[62] T. May, *Social Research: Issues, Methods and Process* (Open University Press, 2012) 132-136; N. Denzin and Y. Lincoln (eds.) *The SAGE Handbook* (Sage, 5th edition, 2018) at 3.
[63] A. Bryson and S. McConville, *The Routledge Guide to Interviewing: Oral History, Social Enquiry and Investigation*, (Routledge, 2014) at 12.
[64] K. Punch, *Introduction to Social Research: Quantitative and Qualitative Approaches* (Sage, 3rd edition, 2014) at 145.
[65] J. Popay, J. Rogers and G Williams, 'Rationale and standards for systematic review of qualitative literature in health services research' (1998) *Qualitative Health Research* (8) 345 cited in E. Fossey, C. Harvey, F. McDermott and L. Davidson, 'Understanding and evaluating qualitative research' *Australian and New Zealand Journal of Psychiatry* 36 (2002) at 723.
[66] One interview with a Tribunal judge was held in September 2018, in Paris.
[67] See: https://www.icty.org/en/about/tribunal/organisational-chart
[68] D. Beetham, 'Revisiting Legitimacy, Twenty Years On' in J. Tankebe and A. Liebling (eds.) *Legitimacy and Criminal Justice: An International Exploration* (Oxford University Press, 2013) at 24.
[69] The Chief Prosecutor and his Principal Legal Counsel and Deputy to the Prosecutor were formally invited for an interviewee. The OPT responded and one senior staff member met in place of the Chief and Deputy Prosecutor. In

were interviewed: one senior member of the Court Support Services, one junior, staff of the Witness and Protection Unit, Legal Aid and Defence Matters, Public Information and Outreach.[70] An interview with a defence lawyer was also conducted at the Tribunal. Gaining access to interviewees who were working in The Hague was an arduous task. "Purposeful sampling"[71] was undertaken to identify interviewees for their knowledge, to obtain a balance of opinions from differing levels of seniority, and different practice areas (lawyers, journalists, public relations, psychologists for example).[72] Names were obtained through public documentation.[73] Formal letters of invitation were sent out two months in advance, but positive responses came after considerable email correspondence and numerous phone calls to the Tribunal's administrative staff. When one judge was thanked for agreeing to be interviewed, he laughed and said that "persistence"[74] had paid off. Snowballing[75] also occurred while at The Hague since three interviews were obtained due to senior staff members requesting their staff or colleagues to be interviewed.[76]

The researcher had held "elite interviews",[77] with senior professionals, in previous research, and in the context of contested issues (see s.2.5). All initial questions were open-ended.[78] Probing into these specific challenges came later in the interviews, by which time a good rapport had usually developed.

Interviews with eight staff members of the Tribunal were held and their overall views obtained. These staff members are insiders,[79] described by Takemura as "constituent members".[80] To obtain a balance, as far as possible, defence attorneys (relative outsiders) were invited for interviews and one interview was held. They were physically working at the Tribunal but representing the accused (and

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contrast to snowballing at the Registry and President's Office, no further interviews were obtained with other prosecutorial staff.

[70] Additionally, an informal meeting was held with a former Prosecutor. See Annex II for full list of interviewees.

[71] M.Q. Patton, 'Qualitative Research and Evaluation Methods' (Sage, 3rd edition, 2002) at 40.

[72] M.Q. Patton, 'Qualitative Research' 3 *Encyclopaedia of Statistics in Behavioural Science* (Wiley-Blackwell, 2005).

[73] Judgments identified the relevant judges, prosecutor and defence lawyers, conference proceedings identified staff, from the President's Office, the Registry and Outreach; Press Releases identified the relevant staff from the Media and Public Relations team

[74] Interview, Judge, The Hague, afternoon 30/01/2017.

[75] A. Bryson and S. McConville, *The Routledge Guide to Interviewing: Oral History, Social Enquiry and Investigation* (Routledge, 2014) at 40.

[76] At the Registry and the President's Office.

[77] A. Bryson and S. McConville, *The Routledge Guide to Interviewing: Oral History, Social Enquiry and Investigation* (Routledge, 2014).

[78] See Annex III – follow-up questions included the extent to which they believe in the legitimacy of the practice, if not, why not and if yes, why so? As active participants in the decision-making process, could they justify the UER decisions, to themselves and their audiences?

[79] Alongside the categorization of "constituents" the word "regime insiders" can be used, see J. Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute-Settlements' (2001) *Journal of World Trade* 35: 193.

[80] H. Takemura, 'Reconsidering the Meaning and Actuality of the Legitimacy of the International Criminal Court' (2012) *Amsterdam Law Forum* 41 Spring Issue, at 6.

later the perpetrator) and their best interests. One defence attorney agreed to be interviewed, and his perceptions of UER were obtained; his opinions on the practice and reasoning.

The majority of interviewees, especially judges and lawyers, were forthcoming in information sharing and their opinions, and many had strong views on UER. It was noteworthy that although all interviewees, at the outset of the interview, were informed that anonymity was available, less senior staff were often reluctant to express their views in contrast to senior staff members who were outspoken.[81] Two Tribunal judges who were most critical of the UER had opted for anonymity at the outset of the interview. Although other judges were happy for their names to be used, it was decided to place blanket anonymity across all judges to ensure anonymity for these two particular judges. One judge was an exception to the overall outspokenness. He began introductions by stating that questions on specific cases should not be asked as it had been "some time"[82] since the rulings. Most interviewees had the interview transcript or typed notes returned to them[83] with the option to clarify, which a few did.

2.4.2. Interviews with Stakeholders in BiH

Over the course of three months, 51 interviews were conducted with stakeholders in BiH,[84] a total of 57 individuals in all.[85] The range of stakeholders interviewed were: 10 judges (all but one were deciding war crimes case); 10 prosecutors (one of whom was also a member of a Parole Board) and four defence lawyers working on war crimes cases; 20 NGOs, CSOs (Civil Society Organisations), and Victims Associations (VAs) working on victim and conflict related matters; 5 staff from IGOs[86] and 5 independent experts.[87] Having this range of stakeholders provided perspectives of individuals from diverse backgrounds: those who worked in professional roles, judges and lawyers who are meant, in theory, to apply objectivity over emotions throughout their work; those from outside of BiH but with

[81] Of the Registry, three interviewees were held; one senior staff member was very forthcoming with details of the practice and his views, in contrast to less senior staff who were reluctant to voice their opinions; similarly this was the case for two staff members at the President's Office – the senior staff member was forthcoming in contrast to the less senior and the same pattern was reflected in the Communications team.
[82] Interview, Former Judge of the ICTY, 25/01/2017.
[83] All interviewees were offered a return of their transcripts or notes, two who had requested anonymity did not wish to have the notes or the transcript returned.
[84] 51 interviews were conducted in BiH, and one interview was conducted with an interviewee in BiH, over skype in January 2018.
[85] For a full list of interviewees, see Annex II.
[86] Two staff members met separately from the EU; and senior staff from the COE and one senior staff member from the UNDP.
[87] One interview was a senior staff member at an independent state institution, with extensive experience of working in IGOs, another was a lawyer who had worked in the national legal profession with the ICTY rule 11bis cases, another from an NGO and now working with an IGO, another IGO staff member was interviewed but in a personal capacity, and finally an interpreter who had worked with the ICTY in a number of the Srebrenica cases. One NGO representative was too busy to meet during the fieldwork and a skype interview was held on return to Belfast.

years of experience working inside BiH (4 of the 5 IGO interviewees); those who, although they may be more inclined to victims' interests, but may be open to a perpetrators' human rights to rehabilitation as NGOs predominantly working on human rights law; and VAs with direct experience of perpetrators returning to the community within which they reside. Further, the interviews were spread throughout the country; in the Federation (predominately Bosniak and Croat population), the Republika Srpska (RS) (predominately Serb) and the Brčko district (mixed).[88] The geographical spread of interviews across BiH was also valuable as interviewees testified to the specificities of the different typologies of perpetrators returning, and their reception by the different communities within the locality. For example, interviewees in Brčko and Prijedor (RS) spoke of returning low-level perpetrators living in close proximity to them.[89] These interviewees spoke directly to opinions made by interviewees in Sarajevo and larger towns (Zenica) who believed that direct victims in these areas were deeply affected by perpetrators' return and their ongoing presence.

A research assistant was recruited to organise and interpret the interviews conducted in Bosnian, and logistics of travel through the Federation, the Republika Srpska and the Brčko District. All BiH correspondence (arranging and following up interviews) used the language from Bosnian/Croat/Serb versions of the ICTY website.[90] All correspondence was sent in English and Bosnian so the two could be checked against each other, and the original language acknowledged. Prior to interviews, interpretation by the research assistant was prepared by going through the translation of the interview questions and foreseen follow-up questions together. As semi-structured interviews are fluid, the interviews were conducted "*with*, rather than *through*, [the] interpreter".[91] Therefore, the interpreter was given an "induction to the research":[92] the research's aims and objectives, the doctrinal analysis and its findings and concepts such as the purposes of punishment, rehabilitation and remorse.

[88] For a comprehensive outline of the insitutionalisation of ethnic demography see: of the country of BiH: C. Grewe and M. Riegner, 'Internationalized Constitutionalism in Ethnically Divided Societies: Bosnia-Herzegovina and Kosovo Compared' in A. von Bogandy and R. Wolfrum (eds.) *Max Planck Yearbook of United Nations Law* (2011) at 15.
[89] This included one Prosecutor in Banja Luka who raised the case of Mrđa, released early by the ICTY and who was at that time under investigation for another massacre he participated in, had been further investigated for witness intimidation and later he was prosecuted and sentenced.
[90] Obtaining the Bosnian versions of the Statute, the Rules and Procedure of Evidence, the Practice Direction the relevant caselaw both for language and clarity of the details of the process.
[91] R. Edwards, 'A Critical examination of the use of interpreters in the qualitative research *process'* (January 1998) *Journal of Ethnic and Migration Studies* 24(1) 197-208 at 197.
[92] R. Edwards, 'A Critical examination of the use of interpreters in the qualitative research process' (January 1998) *Journal of Ethnic and Migration Studie*s 24(1): 197-208 at 200.

With the exception of the War Crimes Chambers judges,[93] all interviewees were asked if they wished to be recorded or would rather notes were taken. Of the 51 BiH interviews, 24 were conducted in Bosnian with the interpreter, and most were audio-recorded. All recorded interviews were transcribed, and when interviews were not recorded, notes were taken and typed up. Interviewees were asked if they wished to receive a copy. Transcripts were returned for those who did request a copy.

Three interviews had multiple participants.[94] Invitations were sent to individuals and in some instances they invited colleagues.[95] Interviews with multiple participants and an interpreter posed specific challenges. In the first such interview, the judges interrupted each other and gave little space for interpretation. In the following interviews, when necessary, an active approach was taken, when they spoke over each other or interrupted, the interviewees were asked to pause to allow for interpretation. With the exception of judges, the majority of interviewees were interested in the research, wanted to know more about the process and reasoning for UER, and wanted to voice their opinions. Judges who often initially expressed little interest became more engaged when the matter of perpetrators' rehabilitation and return were raised.

This thesis does not claim that the interview data is fully representative of stakeholders' groups (judges, lawyers, NGOs, victims etc). The fact that this element of the thesis (the sociological legitimacy of UER) is qualitative, and further that the interviewees were of selective groups, means that they do not provide a full answer to the question of the perceived legitimacy of the practice. However, the interview analysis captures a snapshot of UER's perceived legitimacy at a time and place with a select group of stakeholders, and discusses patterns of shared perceptions and, through analysis of the interviews how these align with existing concepts of legitimacy[96] and context, and a proposed understanding of why these perceptions were held. It provides a rich and deep understanding of their perceptions.

The nature of the semi-structured interviews, in part, a conversation between the researcher and the interviewee, meant that the researcher was able to provide information on the details of early

[93] The two interviews with four judges of the Bosnian State Court War Crimes Chambers were not recorded as the recorder was not allowed to be brought into the Chambers.
[94] Often reflecting the ethnic make-up, a Serb and a Bosniak were the two State Court judges interviewed on the first day, the second two were both Serb as Aldijana pointed out after the interview. An interview with an NGO had an interpreter; also one of the staff members spoke fluent English.
[95] In the case of judges and prosecutors, where names were not provided by the court staff, open invitations were sent to the judges via the court administrative staff.
[96] Notably the standards of legitimacy, set out in Chapter 3, s.3.5.

release and Tribunal stakeholders' perceptions of the practice, which were unknown to the interviewee. This sharing of information adds to the ethical dimension of research (detailed s.2.5). Many of the interviewees were, although frequently frustrated with UER, glad to have received some answers as to why the practice happened and the knowledge that many in The Hague also had misgivings about the practice. Further, sharing this information was positive for the value of the research overall. Firstly, it provided the research with a more nuanced understanding of "legitimacy" elements, as the interviewee could voice their perceptions of not only the legitimacy of outcome (the actual early release),[97] but its legitimacy of exercise – that is, the operationalisation and its reasoning. Secondly, as a result of this, more in-depth understanding allowed the researcher to propose[98] ways in which practice of early release, where it occurs in other International Criminal Tribunals (ICTs), and even the UNMICT, could be operationalised so as to, as far as possible, obtain some legitimacy.

In advance, and again before commencing the interview, all interviewees were offered a subject information sheet and consent form to sign or to give oral confirmation that they agreed to be interviewed.[99] Many had not read the information sheet in advance, and a brief introduction was made, [100] ensuring participants gave voluntary informed consent.[101] All interviews began with a short introduction by the researcher, and all interviewees were asked to speak about their own or their organisation's background - if they wished.[102] This was a sign of respect that it was their voices as individuals that were being sought, actively listened to and reported on. It was their *unique* opinions and contribution to knowledge. They were research participants not subjects. This approach was taken and is captured best by Kelman, who urged that the model of elite interviewing be applied to all interviewees. Practically, this translates into orientating an interviewee to reflect that "the interview[er] is concerned with [the interviewee's] personal opinions, beliefs, and experiences – matters on which he clearly has unique information to contribute".[103]

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[97] Researchers have already reported (noted in Chapter 4) the frustration of the Tribunal's UER.
[98] Detailed in the findings Chapters 6, 7 and 8,
[99] B. Browne and L. Moffet, 'Finding Your Feet in the Field: Critical Reflections of Early Career Researchers on Field Research in Transitional Societies' (2014) *Journal of Human Rights* Practice 6(2): 223–237 at 228.
[100] A. Bryson and S. McConville, *The Routledge Guide to Interviewing: Oral History, Social Enquiry and Investigation*, (Routledge, 2014) at 57. They were informed what the research was about (and what it was not about), its aims, and how the information and views they shared would be used. They were told they could terminate the interview at any time, and could have anonymity. Interviews were either audio recorded or notes were made
[101] H.C. Kelman, 'The Rights of the Subject in Social Research: An Analysis in Terms of Relative Power and Legitimacy' (1972) *American Psychologist* 27(11): 989-1016 at 1001.
[102] In The Hague this was often asked in terms of their professional backgrounds; the same for judges and lawyers and international NGOs in BiH, and for VAs an introduction of their work.
[103] H.C. Kelman, 'The Rights of the Subject in Social Research: An Analysis in Terms of Relative Power and Legitimacy' (1972) *American Psychologist* 27(11): 989-1016 at 1004.

While the research successfully secured these 51 interviews, there was also evidence of research fatigue in BiH that meant not all people contacted agreed to be involved. Twenty-five years after the war most NGOs had been interviewed numerous times by Western researchers. The sense of fatigue and frustration was eloquently noted by one NGO Director, as she declined an interview. She stated that her NGO was not looking back anymore, only looking forward. In addition to providing an example of research fatigue, this example is noted as it is believed that it demonstrates the value of sending out the information sheet in advance (for voluntary informed consent). Individuals are provided with the opportunity to make informed decisions as to whether or not to participate, and the practice ensures that the principle of "do no harm" was being applied. [104]

2.4.3. Analysis of Fieldwork Data

In both The Hague and BiH a journal was kept. It recorded the environment in which research occurred, not only in the course of the interviews but in the wider context of the Tribunal and the various cities, towns and villages in BiH. During trips to areas with the interpreter, the research journal consisted of joint reflections, such as the body language of the interviewee and so on. The practice of the journal and recording notes meant that the interpretative process of data analysis began actively during the course of the fieldwork itself.[105]

The method employed for analysing the interview data drew upon Braun and Clarke's method of thematic analysis. The thematic analysis method echoed the methodology of analysing qualitative research: "analysis … is sorting out the structures of significance".[106] These structures of significance are themes. The computer software NVivo was the relevant tool for undertaking this method rigorously. NVivo provided a means to read through transcribed interviews and code by identified themes, add new themes and cross-reference them. Before using NVivo, the thematic analysis of the data was commenced in the fieldwork period itself, as audio-recordings of the interviews were transcribed by the researcher as soon as possible after the interview. Possible themes (identified through dominant phrases used or issues raised by interviewees) were noted in the researcher's journal – the data that "emerged as important and of interest from the text".[107] One month after the fieldwork, all transcriptions (including the Bosnian-English interviews) were uploaded into NVivo for

[104] G. Burgess (ed.) *Field Research: A Source Book and Field Manual* (Allen and Unwin, 1982).
[105] E. Fossey, C. Harvey, F. McDermott and L. Davidson, 'Understanding and evaluating qualitative research' (2002) *Australian and New Zealand Journal of Psychiatry* 36: 717-732 at 729.
[106] C. Geertz, 'Thick Descriptions: Towards an Interpretative Theory of Culture' in C. Geertz (ed.) *The Interpretation of Cultures: Selected Essays* (Fontana Press, 1993) at 9.
[107] I. Seidman, *Interviewing as Qualitative Research: A Guide for Researchers in Education and the Social Sciences*, (Teacher's College Press, Columbia University, 3rd edition, 2013) at 119. Braun and Clarke describe this in their method as 'familiarizing yourself with the data" whereby they recommend that during transcribing, reading and re-reading, initial ideas are noted down at 87, V. Braun and V. Clarke, 'Using thematic analysis in psychology' (2006) *Qualitative Research in Psychology* 3: 77-101.

systematic analysis of the overall interview data, which were clarified, merged and drilled down into dominant themes and sub-themes, and their relationships.

Utilising NVivo[108] enabled the disaggregation of the interview data so it became organised and viewable under research themes.[109] The initial set of nodes in NVivo denoted the broad themes already identified from the literature review, and the relevant jurisprudence of the Tribunal (the early release decisions and the related sentencing judgments). Two of these are the basis for the findings chapters on victims' sense of (in)justice and the perceptions of the applicability of rehabilitation, and what it entails or – indeed- does not entail, for the perpetrators of atrocity crimes (Chapter 6). New themes emerged in the course of the analysis, primarily through word frequency, which connected to the literature on the purposes of punishment for atrocity crimes and the impact of UER on this purpose. The theme of "expressivism"[110] as moral condemnation was identified from the prevalence of the word "message", and phrases around communicating denunciation. This finding is detailed in Chapter 7.

2.5. Reflexivity and the Ethics of Conducting Interviews in a Post-Conflict Society

Reflexivity is discussed as the researcher approached the study with the view that complete neutrality in socio-legal research is not genuinely possible, that there is "no truly objective way of seeing".[111] As asserted by others, "the researcher … cannot escape the fact that the researcher is part of the studied world and that her orientations will be shaped by socio-historical locations of the researcher, including the values and interests that these locations confer upon the researcher".[112] Recognising this subjectivity from the outset meant that this framing was continually addressed and accounted for; it also allows the reader to read the work in light of this. Further, it meant that the researcher has experience in living, working, and interviewing in conflict-affected, ethnically divided

[108] In addition to 'nodes' (themes), sub-nodes (sub-themes) been attributed to data NVivo software enables data to be assigned multiple nodes which meant that relationships between the themes, and sub-themes were more visible to the researcher. This was particularly valuable as running these 'queries' in NVivo indicated the specific elements of legitimacy: both the normative legitimacy and the legitimacy of exercise that are challenged by the decision-making process, discussed in chapter 4; and the elements of purposive legitimacy pertinent to both the impact of UER on the moral condemnation of atrocity crimes, and victims' sense of (in)justice.

[109] For example, areas of contestation, around the legitimacy of exercise, legitimacy of?? NVivo aided the management and analysis of the data, as the researcher coded representative quotes of the most dominant issues (themes) identified by the interviewees. The "prevalence of these themes"[109] in the data signified the repercussions that UER had on these attributes of international criminal justice.

[110] M. Drumbl, *Atrocity, Punishment ad International Law* (Cambridge University Press, 2007) at 173-179; R. D. Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law' (2007) *Stanford Journal of International Law* 43: 39-94.

[111] J. Kincheloe, 'Fiction Formulas: Critical Constructivism and the Representation of Reality' in W.G. Tierney and Y.S Lincoln (eds.) *Representation and the Text: Re-Framing the Narrative Voice'* (State University of New York, 1997) at 57.

[112] S.M.H Nouwen, 'As you Set out for Ithaka': Practical, Epistemological, Ethical, and Existential Questions about Socio-Legal Empirical Research in Conflict' referencing M. Hammersley and P. Atkinson, 'Principles in Practice' (1995) Ethnography 5: although Nouwen noted that Hammersley and Atkinson refer to reflexivity as 'reflexity' at 234.

countries, including interviewing and meeting victims, and perpetrators of conflict.[113] However, these experiences of research to date have been as a partial-insider (as a resident in the country, in the North of Ireland, and in Sri Lanka, having one parent from Sri Lanka). In BiH, however, there was an immediate distance from all interviewees; travelling in from the outside and yet also as a woman of colour. For some of the interviewees, primarily outside of Sarajevo, the fact that the researcher was evidently a member of an ethnic minority was a point of interest (as interviewees asked the researcher's nationality or origin) and, possibly, though not confirmed, had a commonality with a number of the interviewees who were the minority group in the RS and Brčko. One interviewee, a Victims' Association (VA), in the RS, on hearing the UK accent, asked the researcher her country of origin. When it was noted that she had mixed heritage and was coming from Belfast, in the North of Ireland, this appeared to ameliorate an initial sense of hostility. He noted that the UK was a member of NATO and thus responsible for the bombing of late August 1995, which he experienced, whereas Ireland and Sri Lanka were not Member States of NATO as far as he knew.

For the researcher, with a human rights background, a sense of guilt sometimes arose in meetings with VAs, when they recalled the crimes committed against them. The researcher could not assist them in any way; the policy of UER did not appear likely to change. Although this was acknowledged at the outset, and they had agreed to meet on the two occasions (below) when palpable harms were raised, there was, and is, a deep regret at bringing the interviewees' personal harms to the fore in an attempt to obtain their perceptions of UER. When questioned about the details of the decisions and decision-making process, most expressed anger or at least disappointment, but almost all commented that were glad to have their opinions of this documented and shared with staff at The Hague Tribunal.

Most of the Bosnian interviewees described themselves either as victims of the war or as being fortunate not to have experienced direct loss during the war. With the exception of judges and prosecutors, many interviewees noted their ethnic background, especially the VAs, and on one occasion specifically to emphasise that their VA had members from all three ethnicities - Bosniak, Croat and Serb. All VAs interviewed had experienced either direct harm or murder of a family

[113] Research has been conducted in Northern Ireland relating to the Bill of Rights, in which political elites, community groups were interviewed. One political leader had been a paramilitary convicted of murder. Interviews on Domestic Violence in Minority Community population were also untaken, not with victims themselves but with NGOs and state bodies. Additionally, the researcher belongs a voluntary group which visits and monitors a short-term immigration detention facility where she has met with people who have experienced trauma, who in fact should not be held in these detention units.

member or members, had been a camp detainee, or had been the survivor of rape.[114] Attempting to prevent re-traumatization, no interviewees were asked about their experiences during the war,[115] but many from VAs raised the harms they experienced, which were often ongoing.[116] This possibility was recognised in the ethics application, that as perpetrators were being discussed, recollection of past trauma may arise.[117] Listening respectfully and offering empathy was the best that could be done.[118] As the direct victims interviewed were active members of VA, they had knowledge of counselling options, if available.

Two interviewees, both direct victims, broke down during the interview, one recalling the murder of her child, the other, speaking in the third person, had experienced direct harm. Both interviews were paused. Both women, however, wished to finish the interview. Although the interview was recommenced in each case, not all the questions were asked, as they had already, in a sense, answered them, and it would have been insensitive to pose the question of what factors could justify the practice of early release after the comments which had arisen organically in the interview.[119] These two women were both members of CSOs who had been recommended by the Director of the Women's Organisation and their organisations are members of umbrella advocacy groups. These two interviews are highlighted for three reasons. Firstly, as a simple act of honesty and transparency,[120] a recognition that despite all appropriate measures having been taken, that there was a risk of, at least during the course of these two interviews, opening up wounds.[121] Secondly, their lived experience is important to acknowledge, as one of the interviewees requested that the thesis noted her belief in the ICTY's legitimacy. She requested that the researcher "please tell the ICTY that they have lost all legitimacy".[122] This sharply contrasted to others, and it is

[114] My application to Ulster University's Ethics Board noted that I would be talking to representatives of victims' Associations. Although no direct approaches were made to victims per se, the application acknowledged that some of these representatives would likely be direct victims.
[115] J. Goodhand, 'Research in Conflict Zones: Ethics and Accountability' (2000) *Forced Migration Review* 8 at 13.
[116] This was notably the case for two victims' who both noted that family members' remains, who had been killed in the war, were still missing.
[117] C. Nordstrom and R. Robens (eds.) *Fieldwork under Fire: Contemporary Studies of Violence and Survival* (University of California, 1995), 105-129; V. Das (ed.) *Mirrors of Violence: Communities, Riots and Survivors in South Asia* (Oxford University Press, 1995) 345-398; and D. Laub, *Crisis of Witnessing in Literature, Psychoanalysis and History* (Routledge, 1992).
[118] A. Bryson and S. McConville*, The Routledge Guide to Interviewing: Oral History, Social Enquiry and Investigation* (Routledge, 2014) 165-166.
[119] One interviewee had said that only the death penalty was an appropriate punishment and went onto describe the murder of her child (14/11/2017) and another interviewee (04/12/2017), when asked about a sound reason for early release responded "how can a victim even think about this?"
[120] These incidents are not recorded as performance of what R. Merister has called "feel[ing] good about feeling bad", After Evil: A Politics of Human Rights (2011) 73 cited in S.M.H Nouwen, 'As you Set out for Ithaka': Practical, Epistemological, Ethical, and Existential Questions about Socio-Legal Empirical Research in Conflict' at 237.
[121] P. Bell, 'Ethics of Psychiatric Research in Conflict Areas' in M. Smyth and G. Robinson, *Researching Violently Divided Societies* (Pluto Press, 2001) 185-187.
[122] Interview, VA, BiH, 14/11/2017.

suggested that the reason for this is due to their lived reality, including the absence of contact they had had with the ICTY.[123] Thirdly, the thesis wishes to highlight that, despite the harm that continues to be experienced, these two interviewees are both active participants in Victim Support groups, one actively advocating for reparations, and the other part of a group providing counselling and ongoing psychological support for survivors of wartime rape. Their desire to meet and share their stories are testimony not to their victimhood but to their strength of character.

As noted at the outset, nothing tangible was provided to those who participated in the research. In the information sheet, and at the beginning of the interviews in BiH, it was noted that the practice of UER was unlikely to change (based on the majority of opinions in The Hague). The idea, at a minimum, of having their opinions recorded and acknowledged was important. Therefore, an executive summary will be written, and emailed to all research participants. This will allow the researcher to communicate the findings and provide recognition to the participants' voices and opinions and evidence that these opinions had been sent to the judges at The Hague.

2.6. The Strengths and Limitations of this Research

The major strengths of this research are that the thesis provides valuable insights into an under-researched but important element[124] of international criminal justice. The findings, through identifying the major legitimacy deficits of the practice, have thereby identified means by which the practice can be altered in order to ameliorate the deficits. Additionally, by taking the actor-orientated approach, interviewing insiders of the Tribunal which granted UER and interviewing outsiders affected by the practice - stakeholders in BiH, the interview data has found important commonalities (shared beliefs) as to what can, where applicable,[125] justify early release from imprisonment for perpetrators of atrocity crimes. Although it is recognised that these shared beliefs are not universal, they provide lessons which can be learned by all institutions (international and national) which pursue criminal justice to address atrocity crimes, which could strengthen its legitimacy in the eyes of the community which it is meant to serve.[126] The limitations of this research

[123] This contrasted with the other three victims interviewed who had direct, sometimes ongoing engagement with the ICTY.

[124] In doing so it uncovered a 'negative' finding that, in fact, for the majority of interviewees the enforcement of sentence was not such an important element of international criminal justice: that some justice was done was better than no justice.

[125] For example, substantial cooperation with the prosecutor may not be available to the perpetrator.

[126] A. Barak, 'On Judging' – 'the law, as a normative system, has a role in society. It is intended to ensure functional social life. It contains order and security alongside justice and morals" in M. Scheinin, H. Krunke and M. Aksenova (eds.) *Judges as Guardians of Constitutionalism and Human Rights* (Edward Elgar Publishing, 2016) at 47.

are that, as a largely qualitative study, it cannot be said to be representative of stakeholders' groups. Only one former ICTY President was interviewed and that one was reluctant to provide any perceptions as such. As the interviews were voluntary and many invited to be interviewed did not respond, this suggests that those interviewed had some interest in the topic and desire to share this opinion. These findings do not claim to be representative of the population of BiH, which may have been asserted if a random sampling survey had been conducted. Further, given that a significant number of interviewees, when probed, indicated that they were, in large part, dissatisfied with UER, it may be the case that those people who did not respond to the request for interview did so because they were satisfied (or at least not dissatisfied) in relation to the practice. This attitude, of no dissatisfaction with UER, was indeed the immediate reaction of some judges. Yet, as the interviews unfolded, and more thought given to the operationalisation of and reasoning for the practice a more nuanced attitude was taken.

As a single case study, the thesis' findings are not generalizable to other ICTs which make UERs. However, it provides an original contribution to the analysis of the sociological legitimacy of UER[127] through a range of stakeholders' opinions. In doing so, it has identified commonalities between these stakeholders, which may be applicable to other ICTs.

It is acknowledged here that other factors are bound to inform perceptions of the legitimacy of the practice of UER and the overall legitimacy of the Tribunal itself, as indicated by scholars elsewhere.[128] The reality that other factors inform perceptions is recognised throughout this thesis. However, by acknowledging and discussing that these other factors may have shaped stakeholders' perceptions, there is a level of "transferability".[129] Similarities remain in spite of the differences, as other ICTs hold jurisdiction over perpetrators who commit atrocity crimes and return to the region. By highlighting that the research produces "context-dependent knowledge" it offers a "true understanding ... in another form … in terms of its … applicability".[130] The thesis has recognised and examined these circumstances existing in BiH. These are subtle particularities that other post-

[127] It was, as far as the researcher could see, a phenomenon about which 3 academic articles had been published, none of which had undertaken the gathering of perceptions.
[128] E. Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (University of Pennsylvania Press, 2005) 106-107, noting that perceptions of the Tribunal's treatment differed after controversial acquittals; 11 witnesses who had noted in a first round of interviews that their experience of testifying at the Hague Tribunal, was later reversed by ten of the 11 (after a controversial acquittal) at 106-107; and S. Ford, 'A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms' (2012) *Vanderbilt Journal of Transnational Law* 45: 405-476 at 439.
[129] C. Delmar, 'Generalisability' as recognition: Reflections on a foundational problem in qualitative research' (2010) *Qualitative Studies* (1): 115-128.
[130] L. Carminati, 'Generalizability in Qualitative Research: A Tale of Two Traditions' (2018) *Qualitative Health Research* 28(13): 2094–2101.

conflict societies may or may not share. These specific circumstances now highlighted, enable other researchers' and ICTs practising early release to be alert to them.[131]

Further, over the course of the research, UER was amended, and the Residual Mechanism introduced conditional release – therefore, as the findings will discuss, the most significant legitimacy deficit of the practice, its unconditional nature, has now been remedied. However, this amendment, the researcher believes, indicates that the practice was acknowledged as having a legitimacy deficit and that institutions of power (The Tribunal) do wish to be perceived as legitimate, and will create strategies to maintain legitimacy, which is a positive for International Criminal Justice.

2.7. Conclusion

The thesis' research question, "what was the practice of, and reasoning for, the ICTY's grant of UER, how do stakeholders perceive its legitimacy and to what extent do these perceptions impact on these stakeholders' overall perceptions of the ICTY's legitimacy?" required multiple legal methods: doctrinal analysis, empirical legal analysis of early release decisions and a qualitative, socio-legal method of inquiry for stakeholders' perceptions to be understood. The chapter has outlined how and why these methods were adopted to answer this research question. In recognising the position of an "involved outsider"[132] the research endeavoured to minimise bias by engaging with a range of stakeholders, conducting semi-structured interviews and allowing, as far as possible, for interviewees' authentic voices to be represented. In order to understand perceptions of the legitimacy of the practice, it first had to have an understanding of the concept of legitimacy itself. This thesis' understanding of legitimacy is set out in the following chapter.

[131] D. Lincoln and E. Guba, *Naturalistic Inquiry*, (Sage, 1985) have argued that "it is ... not the naturalist's task to provide an index of transferability; it is his or her responsibility to provide the data base that makes transferability judgments possible on the part of potential appliers" at 316.

[132] T. Hermann, 'The Impermeable Identity Wall: The Study of Violent Conflicts by "Insiders" and "Outsiders"' in M. Smyth and G. Robinson (eds.) *Researching Violently Divided Societies: Ethical and Methodological Issues* (United Nations University Press, 2001) at 77.

Chapter 3: The Legitimacy Framework

3.1. Introduction

There is a range of concepts used to analyse institutions of power and their exercise of power (such as efficiency, fairness, rightness). This chapter focuses on the concept of legitimacy, as detailed below, on the basis of the argument that it is the most appropriate for exploring Unconditional Early Release (UER) of convicted perpetrators, and the extent to which UER has had an effect on how key stakeholders perceive the ICTY overall. Although the thrust of the chapter is analytical and conceptual, frequent references to the ICTY are noted to explain why this framing was an appropriate means by which to understand UER. The following chapter builds upon this framing as it discusses directly the assessment of the ICTY's legitimacy in the scholarship.

Legitimacy in international law is often understood to broadly relate to the "justification of authority"[1] and its exercise of power. This thesis uses the legitimacy frame for three reasons. Firstly, institutions are widely presumed to require legitimacy in order to exercise power.[2] Secondly, institutions exercising power, generally, wish to be perceived as legitimate.[3] Thirdly, scholars have used this frame, albeit without necessarily using the word "legitimacy", in examining the Tribunal's exercise of power.[4] In undertaking an examination of the legitimacy of UER and how relevant stakeholders perceived this, the thesis explores two dimensions of legitimacy – normative legitimacy and sociological legitimacy - which the thesis asserts are intertwined to such an extent that they cannot be fully isolated from one another (s.3.3). The notion of justification for authority recognises the capacity for two dimensions of legitimacy or approaches to assessing legitimacy.[5]

Normative legitimacy is the first dimension of legitimacy and has two analytical elements (s.3.2) – a strict legal element and a moral element – although these elements are rarely named explicitly as

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[1] R. Wolfrum and V. Roben (eds.) *Legitimacy in International Law* (Springer, 2008) at 6.
[2] M.C. Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) *The Academy of Management Review* 20(3): 571-610 at 574.
[3] R. Barker, *Legitimating Identities: The Self-Presentations of Rulers and Subjects* (Cambridge University Press, 2004) at 18.
[4] S. Ford, 'Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms (2012) *Vanderbilt Journal of Transnational Law* 45(2) who notes that "there is a large body of literature arguing that positive perceived legitimacy is an important factor not only in the success of international criminal courts, but also in the success of all transitional justice mechanisms" at 408. This is the literature that is outlined in Chapter 4.
[5] D. Bodansky, 'The Concept of Legitimacy in International Law' in R. Wolfrum and V. Roben (eds.) *Legitimacy in International Law*, at 313, who argued that "we can consider legitimacy from two perspectives … one way to study legitimacy is from the prospect of philosophy – to think of legitimacy in normative terms. Here the issue is: what gives some institutions the right to rule?" and also A. Nollkaemper, 'The Legitimacy of International Law in The Case Law of the ICTY' in T.A.J.A. Vandamme and J. Reestman (eds.) *Ambiguity in the Rule of Law: the Interface between National and International Legal Systems* (Europa Law Publishing, 2001) at 13.

such.[6] For scholars who analyse institutions' normative legitimacy, an institution is legitimate to the extent that it satisfies certain conditions.[7] These conditions are itemised by scholars. The conditions (described in this chapter as standards) are: procedural (in strict compliance with rules)[8] for scholars who focus on the positivist-legal aspect of law; and "moral" or a "sense of justice" for scholars who focus on the morals underlying the law.[9] These standards are considered by such scholars as objective, derived either through adherence to agreed rules or procedures or, where rules are not yet in place, agreed basic norms – morals underlying the law. These basic norms are often conceptualised as norms that are "genuinely … moral[ly] right".[10] In terms of international law, and for international criminal law, these are peremptory norms such as the prohibition of torture and slavery.[11] What specific morals are, however, is not an area of universal agreement,[12] and scholarly understandings of what is morally right may not be shared by ordinary citizens.[13] Normative legitimacy in this thesis refers to, unless explicitly noted otherwise,[14] the dual normative – the legal and the moral elements, not always distinguishable.[15]

To be clear from the outset: this thesis is not an assessment of UER's moral legitimacy. In exploring UER's sociological legitimacy, it does, however, explore people's beliefs.[16] These beliefs are often based on people's sense of rightness, a moral core, whether explicated or not. Morals, therefore, do play a role.

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[6] With the exception of M. Drumbl and R. Henham who discuss the moral legitimacy of plea bargaining – see Chapter 4, s.4.4.1.

[7] L.H. Meyer and P. Sanklecha, in L. H. Meyer (ed.) *Legitimacy, Justice and Public International Law* (Cambridge University Press, 2009) at 2.

[8] V. Popovski and N. Turner, 'Legality and Legitimacy in International Order' (2008) *United Nations University Policy Brief* 5, at 4.

[9] H. Taekmura citing R. Miillerson, 'Aspects of Legitimacy of Decisions of International Courts and Tribunals: Comments' in: R. Wolfrum and V. Roben (eds.) *Legitimacy in International Law* (Heidelberg: Springer 2008) at 191.

[10] A.I Applbaum, 'Legitimacy in a Bastard Kingdom', *John F. Kennedy School of Government Center for Public Leadership Working Papers* (Spring 2004): 73-94 at 76.

[11] S. Ratner, 'Ethics and international law: integrating the global justice project(s)' (2013) *International Theory* 5(1): 1–34 at 4 cited N. Clark, 'International Criminal Courts and Normative Legitimacy: An Achievable Goal?' (2015) I*nternational Criminal Law Review* 25(4): 763-783 at 778.

[12] It is further noted that the literature reviewed in this thesis is largely Western-dominated (US, European scholars) or academics and observers working within the western legal system, For example, there are no articles from Asian or African journals, and from the 69 interviewed, only three interviewees were from Africa and Asia. The ICTY was an institution exercising power over atrocity crimes committed in mainland Europe.

[13] This is especially so in times of war, as Chapter 7 in particular demonstrates.

[14] Sometimes, notably in Chapter 5 on the practice of UER, the thesis denotes that an analysis of the normative dimension is referring to the legalist aspect.

[15] H.L.A. Hart, *The Concept of Law* (Oxford University Press, 2nd edition, 1994) at 269 cited J.N. Clark, 'International Criminal Courts and Normative Legitimacy: An Achievable Goal?' (2015) I*nternational Criminal Law Review* 25(4): 763-783 at 778.

[16] A. Buchanan and R. O. Keohane, 'The Legitimacy of Global Governance Institutions', in L. H. Meyer (ed.) *Legitimacy, Justice and Public International Law* (Cambridge University Press, 2009). To be noted later - "sociological sense … when it is widely believed to have the right to rule" at 29.

Sociological legitimacy is the second dimension of legitimacy, or the approach to understanding legitimacy. For scholars examining this dimension of legitimacy, an institution is legitimate to the extent that it is believed to be so by those over whom it claims authority. Legitimacy is not solely about an institution meeting predetermined conditions, but also relates to "the fact that … the particular claim to legitimacy is to a significant degree … treated as 'valid'"[17] by those over which it claims authority. This is a subjective test of legitimacy; it is a layperson's belief, rather than based on conditions set by scholars.

The thesis explores the normative (legal) legitimacy of the Tribunal's practice through an analysis of the early release decisions, examining the practice against the rules and procedures (Chapter 5). It then explores its sociological legitimacy through a focus on a range of stakeholders' perceptions and discusses the practice's repercussions (Chapters 6, 7 and 8). These stakeholders are insiders at the Tribunal and specific members of the society it has an effect on,[18] post-conflict BiH.

This chapter now turns to explain its interpretation of normative legitimacy. This encompasses both a strict legalist element and an underlying moral element. It argues that, although legality is key to normative legitimacy, it is not its only element, as law has at its foundations a moral core (s.3.2). It discusses the complementary nature of the normative and sociological approaches to assessing legitimacy of institutions, which is the approach taken by this thesis (s.3.3). The chapter then sets out the most relevant categories of legitimacy within which institutions can be viewed as legitimate (s.3.4). It then identifies the standards by which these institutions' legitimacy can be assessed, and, simultaneously, examines proposals for how institutions can obtain and maintain legitimacy (s. 3.5). Finally, the chapter identifies the stakeholders whose views about legitimacy are the focus of the thesis, it answers the question - legitimate or justifiable according to whom? (s.3.6). Broadly, this encompasses insiders (those at the Tribunal) and outside stakeholders (those affected by the Tribunal's exercise of power).

3.2. The Two Elements of Normative Legitimacy

Legal scholarship has, until the turn of the 21st century, predominantly understood legitimacy of international law and institutions through a normative lens (a dimension of legitimacy), and asserted

[17] M. Weber, *Economy and Society*: *an outline of interpretive sociology*, (eds.) Guenther Roth and Claus Wittich (University of California Press, re-issue, 1978) at 214.
[18] See Chapter 2, socio-legal approach to studying the law, s.2.3.

this normative approach was an objective test.[19] The strict legalist positioning provided a "yes" or "no" response. This tick-box assessment of legitimacy was the extent to which international law and institutions were established by correct procedure, and their on-going power exercised in accordance with correct procedure.[20] However, this thesis understands normative legitimacy as more than legality. As stated by Popovski and Turner: "Legality is a distinct, immediate, black and white decision … legitimacy is [a] flexible category".[21] Normative legitimacy encompasses, or this thesis argues are at its core, moral principles, or "moral evaluations"[22] which then become enshrined in the black letter law. Evaluations, unlike "legal facts",[23] are subjective, and are shaped by those making the evaluation. Nevertheless, legality is one feature of normative legitimacy and must be explored in an examination of a legal institution's legitimacy of power.[24] Within the legal field, one of the approaches to international law recognises the moral core. Popovski and Turner described two major schools of legal thought as the "positivist" and "functionalist" schools. For the positivists, international law is regarded as "a firm set of rules to be followed without exception (conceptually deriving from domestic law)", in contrast to the functionalist school who regard "international law as a gradual process of decisions, shaping itself authoritatively through the organs of the United Nations and international treaties".[25] Functionalist lawyers[26] assert that law "exists in a social context"[27] and, consequently, morality and ethics play a role.[28]

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[19] D. Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law' (1999) *American Journal of International Law* 93 'justified in an objective sense' at 601.

[20] T. Franck, *Fairness in International Law and Institutions* (Oxford University Press, 1995) at 7-8.

[21] V. Popovski and N. Turner, 'Legality and Legitimacy in International Order' (2008) *United Nations University Policy Brief* 5(1); W. Sandholtz, 'Creating Authority by Council: The international criminal tribunals' in in B. Cronin and I. Hurd (eds.) *The UN Security Council and the Politics of International Authority*, (Routledge, 2008) at 136 – "Actors may be constantly negotiating or contesting the boundaries of legitimate institutional action, but their evaluation at any given moment reveals the location of informal social norms regarding the legitimate process" and it requires consent efforts to maintain it"; also Y. Shany, Stronger Together? Legitimacy and Effectiveness of International Courts as Mutually Reinforcing or Undermining Notions' (2015) *Hebrew University of Jerusalem Legal Studies Research Papers Series*, No. 15: 17157.

[22] A. Buchanan, 'Legitimacy of international law' in S. Besson and J. Tasioulas (eds.) *The Philosophy of International Law* (Oxford University Press, 2010) at 80. This argument is articulated in the negative by Besson who noted that "legitimacy of law amounts to its ability to provide peremptory or exclusionary reasons for actions". These reasons may be more than legal reasoning.

[23] A. Buchanan, 'Legitimacy of international law' in S. Besson and J. Tasioulas, *The Philosophy of International Law* (Oxford University Press, 2010) at 80.

[24] For the purposes of this thesis, the legality of UER (Chapter 5 on the legal procedure of UER).

[25] V. Popovski and N. Turner, 'Legality and Legitimacy in International Order' (2008) *United Nations University Policy Brief* 5 at 4.

[26] V. Popovski, 'Legality and Legitimacy of International Criminal Tribunals', in R. Falk, M. Juergensmeyer and V. Popovski (eds.) *Legality and Legitimacy in Global Affairs* (2012) Oxford University Press, citing M.S. McDougal and W.M. Reisman, 'The Changing Structure of International law' (1965) *Columbia Law Review* 65 at 388.

[27] V. Popovski, 'Legality and Legitimacy of International Criminal Tribunals' in R. Falk, M. Juergensmeyer and V. Popovski (eds.) *Legality and Legitimacy in Global Affair*s (2012) Oxford University Press, at 388.

[28] V. Popovski and N. Turner, have argued that "functionalist lawyers have according to Popovski and Turner, made international law 'uncertain' and has "loosen[ed] the constraints of legalist[s], and involve[ed] humanitarian and moral discourse to justify controversial policy" at 4.

Many legal observers[29] begin with the positivist approach, in particular Franck, whose "Legitimacy of Power Amongst Nations"[30] began the wider debate on the legitimacy of international law, as international law was becoming more influential.[31] Franck posed, and answered, the question - why should states obey international law when the institutions which formulated the law were not accountable? Franck limited his assessments to the perspective of states and not others who are affected by international law and their decision-making. Nevertheless, he recognised the importance of sociological legitimacy, as he asserted that international law should have a "pull to compliance".[32] He described this "pull to compliance" as the "governed [being] convinced that it is right and proper to obey [authority] and abide by their decisions".[33] However, he declined to consider the compliance pull of international law beyond that of states' beliefs in "justification of authority" of international law and rules. He maintained that individuals within these states would simply be too diverse[34] to have a true assessment of their beliefs. Franck's theory has been critiqued for a lack of distinction between normative and sociological dimensions,[35] and for his equation of the word legitimacy with multiple concepts, *inter alia* procedural fairness, utilitarianism, a desire for order.[36] His theory of legitimacy is less relevant for this thesis, as his focus is on state compliance and does not take into account those whom international law affects.[37]

3.3. Normative and Sociological Dimensions of, and Approaches to, Legitimacy and their Intertwined Nature

The intertwined nature of normative and sociological legitimacy are best articulated by Buchanan and Keohane as they demarcate the difference: "an institution is legitimate in the normative sense [if it can be said] to assert that it has the *right* to rule" and in the "sociological sense … when it is

[29] H. Takemura, 'Reconsidering the Meaning and Actuality of the Legitimacy of the International Criminal Court' (2012) *Amsterdam Law Forum* Spring Issue 41: 7.
[30] T. Franck, *Power of Legitimacy Among Nations* (Oxford University Press, 1990).
[31] D. Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law' (1999) *American Journal of International Law*, 93: 637; S. Besson 'Institutionalising Global Democracy' in L. H. Meyer (ed.) *Legitimacy, Justice and Public International Law* (Cambridge University Press, 2009) at 61.
[32] T. Franck, 'Legitimacy in the International System' (1988) *American Journal of International Law*, 725.
[33] T. Franck, 'Legitimacy in the International System' (1988) *American Journal of International Law*, 725.
[34] T. Franck, *Power of Legitimacy Among Nations* (Oxford University Press, 1990) – 'An aggregate concept of justice and injustice thus distorts reality", at 208-209.
[35] A. Buchanan and R. Keohane, 'The Legitimacy of Global Governance Institutions' in L. H. Meyer (ed.) *Legitimacy, Justice and Public International Law* (Cambridge University Press, 2009) at 29.
[36] D. Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law' (1999) *American Journal of International Law* 93 noted that "the 'term' legitimacy' has been used in often … nebulous ways' and references Franck's 1995 article which four equations of legitimacy as 'procedural fairness', utilitarianism, a desire for order, and right process' at 600.
[37] N. Grossman, 'The Normative Legitimacy of International Courts' (2013) *Temple Law Review* 86: 70; and H. Takemura, 'Reconsidering the Meaning and Actuality of the Legitimacy of the International Criminal Court' (2012) *Amsterdam Law Forum* Spring Issue 41: at 6.

widely *believed* to have the right to rule".[38] For the purposes of this thesis, this right to rule can be read (noted s.3.1) as a "justification for authority" and an ongoing assessment of the justification or justifications for authority. This includes *how* rules are made and put into practice - that is how authority is exercised. At the practical level of scholarship, these approaches often take place in isolation. Some literature takes a legalist and moral philosophical approach, and examines institutions' normative legitimacy, and others adopt a socio-legal (sometimes referenced as empirical) approach to legitimacy often by asking stakeholders if they believe the institution has the right to rule. In terms of analysis, this means sociological legitimacy is the popular perspective of an institution's normative legitimacy (reiterated s.3.5.8). This has been put graphically by Tasioulas, who argued that the "empirical sense of legitimacy … is best understood as parasitic on the normative sense".[39] However, many legal scholars frequently theorise on an institution's normative legitimacy, and leave the task of assessing beliefs of legitimacy (sociological legitimacy) to social scientists. Other legal scholars have begun to recognise this and have noted that "both approaches have a certain normative component".[40] Some legal scholars have gone further in relation to international criminal justice, and have asserted that these two approaches to exploring legitimacy should be taken in tandem, rather than in isolation.[41] Examining the sociological popular perspective of an institution's normative (legal and moral) legitimacy could enable scholars to appropriately analyse how international criminal justice can be perceived as just, and, consequently, achieve and maintain legitimacy, not only from their own perspective, but from the perspective of the population whose lives are affected, a key stakeholder[42] (discussed s.3.6). Legitimacy is also important, since institutions of international law, despite having some coercive powers - for example to issue arrest warrants, have no independent means of exercising coercion over populations, and do not claim to do so, but they nevertheless seek compliance in the form of respect, as noted by Buchanan.[43] The element of respect (perceived legitimacy) of authority and its ongoing exercise of power is the approach taken by this thesis; the ICTY did not have independent coercive force over the people of

[38] A. Buchanan and R. O. Keohane, 'The Legitimacy of Global Governance Institutions' in L. H. Meyer (ed.) *Legitimacy, Justice and Public International Law* (Cambridge University Press, 2009) at 29. Emphasis in original.
[39] J. Tasioulas, 'Parochialism and the Legitimacy of International Law' in M.N.S Sellers (ed.) *Parochialism, Cosmopolitanism and the Foundations of International Law* (Cambridge University Press, 2011) at 17.
[40] Y. Shany, 'Stronger Together? Legitimacy and Effectiveness of International Courts as Mutually Reinforcing or Undermining Notions' (2015) *Hebrew University of Jerusalem Legal Studies Research papers Series*, No. 15-17 at 2.
[41] S. Vasiliev, 'Between International Criminal Justice and Injustice: Theorising Legitimacy' in N. Hayashi and C. M. Baillliet (eds.) *The Legitimacy of International Criminal Trials*, (Cambridge University Press, 2017) at 24. Hereinafter – S. Vasiliev, 'Theorising Legitimacy'.
[42] S. Marks, 'Democracy and international governance' in J. Coicaud and V. Heiskanen (eds.) *Legitimacy of international organizations*, (United Nations University Press, 2001) at 58.
[43] A. Buchanan, 'Legitimacy of international law' in S. Besson and J. Tasioulas (eds.) *The Philosophy of international law* (Oxford University Press, 2010) at 82.

BiH, but it did seek to have its judgments accepted and respected.[44] This thesis takes the position that for an institution to have legitimacy, its "popular acceptance [is] an important … element of [its] normative justification".[45] Popular here denotes the external stakeholders – the general populace (often the layperson).

Political scientist Beetham recognised the complementary nature of the normative and sociological approaches to assessing legitimacy. He asserted that "for power to be fully legitimate … three conditions are required: its conformity to established rules; the justifiability of these rules by reference to shared beliefs; and the express consent of the subordinate".[46] The first two conditions are the two elements of normative legitimacy, as understood by this thesis – the strict legal element ("conformity" - correct application of rules and procedure) and the moral core of the law ("shared beliefs"). Beetham argued that these three conditions cannot be viewed in isolation and asserted that "all three components contribute to legitimacy."[47] He then proposed a framework through which to explore both the normative and sociological dimensions of legitimacy. This approach has frequently been adopted and further theorised by criminologists[48] and scholarship in the criminal justice field, including victimology,[49] rather than international law and international criminal justice. Palmer, however, adopted Beetham's model as a tool to "help explain the social data"[50] relative to the ICTY's sister tribunal, the International Tribunal for Rwanda (ICTR) and its relationship with the national criminal courts and the gacaca courts in Rwanda. Palmer used Beetham's model to explore how the three courts perceived their own legitimacy and that of the others. Beetham's three dimensions ("conditions") of legitimacy were neatly categorised by McEvoy as the legal, the moral and the sociological dimensions of legitimate exercise of power.[51] Beetham revisited his legitimacy framework and labelled his three conditions along much the same lines, affirming that "power is acknowledged as legitimate to the extent that: it [has] legality, [holds] normative justifiability and

[44] See Chapter 4, s.4.3.
[45] D. Bodansky, 'The Legitimacy of International Governance: A coming challenge for International Environmental Law' (1999) *American Journal of International Law* at 600. Bodansky noted that "liberal theories" take this approach, referncing W. Achterberg 'Green Politics: The State and Democracy' in A. Dobson and P. Lucardie (eds.) *The Politics of Nature: Explorations in Green Political Theory* (Routledge, 1995).
[46] D. Beetham 'Revisiting Legitimacy, Twenty Years On' in Tankebe and A. Liebling (eds.) *Legitimacy and Criminal Justice: An International Exploration,* in J. Tankebe and A. Liebling (eds.) *Legitimacy and Criminal Justice: An International Exploration,* (Oxford University Press, 2013) at 19.
[47] D. Beetham 'Revisiting Legitimacy, Twenty Years On' in J. Tankebe and A. Liebling (eds.) *Legitimacy and Criminal Justice: An International Exploration,* (Oxford University Press, 2013) at 20.
[48] A. Bottoms and J. Tankebe, 'Criminology: Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice' (2012) *The Journal of Criminal Law & Criminology* 102(1): 119-170.
[49] M. Laxminarayn, 'Enhancing trust in the legal system through victims' rights mechanism' (2015) *International Review of Victimology* 21(3): 273-286 at 275.
[50] N. Palmer, *Courts in Conflict* Oxford, (Oxford University Press, 2015) at 163.
[51] K. McEvoy, 'A Commentary on Locality and Legitimacy' in N. Palmer, P. Clark and D.Granville (eds.) *Oxford Transitional Justice Researc*h *Critical Perspectives in Transitional Justice* (Intersentia, 2012) cited in N. Palmer, *Courts in Conflict* (Oxford University Press, 2015) at 159.

[has] legitimation". He modelled this as a "heuristic tool to guide analysis of any particular structure … of [a] legitimate power".[52] Beetham, as a political scientist, proposed this framework for assessing states' legitimacy. States have actual subordinates, unlike the ICTY. Thus, his framework required adjustment for the purposes of studying the legitimacy of the ICTY and UER, given that the ICTY had no "subordinates" who could freely "express consent". Therefore, the phrase "consent", used in his 1991 book, is to be read in line with his 2013 article, which changed "consent" to "actions by relevant subordinates which confirm *their acceptance* or recognition of it [the rules and power of the state]".[53] This "acceptance", as McEvoy rightly noted, is the sociological approach to any dimension of legitimacy, which is the extent to which the institution is "*believed* to have the right to rule",[54] namely, that it is perceived as legitimate.

Institutions exercising power generally seek, if not normative legitimacy, at least sociological legitimacy in order to*, inter alia*, work effectively,[55] maintain power[56] and exercise control.[57] In the case of institutions bringing to justice those found guilty of violations of international humanitarian law, this self-interest could have been their success in advancing the no impunity and accountability norms.[58] That is, no one is immune from prosecution (indicted) and thus can be held accountable (trialled and where found guilty sentenced to imprisonment). This self-interest of advancing the

[52] D. Beetham 'Revisiting Legitimacy, Twenty Years On' in *Legitimacy and Criminal Justice: An International Exploration,* in J. Tankebe and A. Liebling (eds.) (Oxford University Press, 2013) at 20.
[53] D. Beetham 'Revisiting Legitimacy, Twenty Years On' in *Legitimacy and Criminal Justice: An International Exploration,* in J. Tankebe and A. Liebling (eds.) (Oxford University Press, 2013) at 20.
[54] A. Buchanan and R. Keohane, 'The Legitimacy of global governance institutions' L. H. Meyer (ed.) *Legitimacy, Justice and Public International Law* (Cambridge University Press, 2009) at 29.
[55] Y. Shany, 'Stronger Together? Legitimacy and Effectiveness of International Courts as Mutually Reinforcing or Undermining Notions' who argued that there is a close relationship between the two - an "effective court is more legitimate than an ineffective court"; T. Tyler, who argued that the better inter-personal treatment by officials and minority groups would enhance the perceived legitimacy of institutions by groups over whom it sought to influence, T. Tyler*, Why People Obey the Law* (Yale University Press, 1990).
[56] S. Vasiliev, 'Not only do they have to stay in good grace with the actors delegating them power, but they must also keep their legitimacy from drying up by continually winning support for themselves from those over whom that power is exercised", 5.
[57] H.J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (Alfred A. Knopf, 6th edition, 1985) at 34.
[58] See J. Subotić, 'The Transformation of International Transitional Justice Advocacy' (2012) *International Journal of Transitional Justice* 6(1): 106–125; L. Vinjamuri and A.P. Boesenecker, *Accountability and Peace Agreements: Mapping Trends from 1980 to 2006* (Geneva: Centre for Humanitarian Dialogue, 2007); C. Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford University Press, 2008); and Y. Shany, Stronger Together? Legitimacy and Effectiveness of International Courts as Mutually Reinforcing or Undermining Notions' (2015) *Hebrew University of Jerusalem Legal Studies Research papers Series*, No. 15-17 at 12 – 'ICTs strive to apply universally accepted legal standards" and cited the preamble of the Rome Statute, "affirming that the most serious crimes of concern to the international community as a whole must not go unpunished … Determined to put an end to impunity for the perpetrators of these crimes … Resolved to guarantee lasting respect for and the enforcement of international justice". This has also been noted by others in relation to the International Criminal Court, see T. Obel Hansen, 'The International Criminal Court and the Legitimacy of Exercise' in P. Andersen, C. Eriksen and B. Viskum (eds.) *Law and Legitimacy* (Djøf Forlag, 2015) at 15.

"norm projection"[59] has been articulated by ICTY President Meron (2003-2005 and 2011-2015), as he asserted that "the ICTY's jurisprudence … establishes an important foundation upon which other criminal tribunals, both international and national … *can build* as they *join in the common mission* of bringing the long era of impunity for mass atrocities to an end".[60] His language of the Tribunal's jurisprudence being built up and others joining in the common mission speaks to language of norms (common mission) and projection of these norms (the Tribunal set the base line for others to further). Therefore, this quotation indicates that some leading judges, such as President Meron at the ICTY, perceived the Tribunal and determined its success as advancing the norm of no impunity and accountability. Discussed below (s.3.4.2), this understanding of the Tribunal was shared, and sometimes justified on this basis of advancing the no impunity and accountability norms.[61]

The question of the legitimacy of UER and the perceptions of that normative legitimacy (its sociological legitimacy) leads to the following: by *whom* and by *what standard* is the practice justified? These questions direct observers to identify the "who" – the audiences, who include stakeholders, - and explore the relevant standards by which they assess the institution's legitimacy. Therefore, the following section outlines the main categories of legitimacy – state consent, purposive, and exercise/performance; the second two (purposive legitimacy and legitimacy of exercise/performance legitimacy) are categories upon which sociological legitimacy is largely determined (s.3.4). Categories are units of assessment of legitimacy and perceptions can assess legitimacy on one or all of these categories. The chapter then turns to the standards upon which sociological legitimacy is assessed and achieved - or not (s.3.5). The final section (s.3.6), then sets out the stakeholders which this thesis took as those who had the right to determine if the legitimacy of UER ought to be justified.

3.4. Categories of Legitimacy

The first category of legitimacy, state consent legitimacy, outlined below, takes a legal positivist approach. It verifies legitimacy based on an institution's adherence to black letter law. It does not consider an institution's sociological dimension of legitimacy. The further categories to be considered here, purposive legitimacy and legitimacy of exercise (sometimes called 'procedural

[59] D. Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law' in S. Besson and J. Tasioulas (eds.) *The Philosophy of International Law*, (Oxford University Press, 2010) at 579.
[60] T. Meron, 'Procedural Evolution in the ICTY' (2004) *Journal of International Criminal Justice* 2: 520-525, at 520 – emphasis added.
[61] For example, the Tribunal's website, under the Tribunal's establishment. The section concludes by noting that "This date marked the beginning of the end of impunity for war crimes in the former Yugoslavia". See: https://www.icty.org/en/about/tribunal/establishment [accessed 02/12/2019].

legitimacy' or 'performance legitimacy') and, to an extent, outcome legitimacy, implicitly recognise the sociological dimension of legitimacy. Thus these categories open up the opportunity to assess legitimacy from the sociological perspective. Therefore, the categories of purposive and procedural/performance legitimacy are the categories that the thesis analyses in depth in the context of the Tribunal's practice of and impact of UER.

3.4.1. State Consent Legitimacy

A traditional normative approach to assess the legitimacy of international law would be to examine, either through practice or declaration, whether or not the state had consented to the law. Under this category "so long as states consent to it, authority is justified",[62] and therefore legitimacy is achieved. This category of state consent can be applied beyond the creation of the law to its practice. The category of state consent to assess the legitimacy of international law has been criticised as outdated.[63] Practically, it does not ask the question of why international law or an institution adjudicating international law is accepted. This narrow approach is questioned, as there may be other reasons for consent; the approach does not recognise the social context.[64] Additionally, it does not look beyond the state, namely to its citizens who are affected by their state's consent to the law.[65] This top-down approach is critiqued due to its undemocratic nature, i.e. the assumption that the state has the right to accept international law without regard to its citizens.[66] This top-down approach is not the approach of this thesis, which is socio-legal,[67] but nevertheless requires recognition, as it remains a legalist approach to determining legitimacy of international law.

3.4.2. Purposive Legitimacy

Purposive legitimacy can be examined outside the boundaries of the strict legalist approach. It has been defined as "the consistency between, on the one hand, the *aims* and *values* underlying the rule, the process, or the institution, and on the other hand, those shared by the relevant society,

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[62] N. Grossman, 'The Normative Legitimacy of International Courts' (2013) *Temple Law Review* 86: at 65.
[63] S. Besson, 'Institutionalising Global Demoi-cracy' in L.H. Meyer (ed.) *Legitimacy, Justice and Public International Law,* (Cambridge University Press, 2009) at 63.
[64] M. Weber, '*Economy and Society*: *an outline of interpretive sociology'*, in (eds.) Guenther Roth and Claus Wittich (1978) at 219, cited in A. Bottoms and J. Tankebe, 'Criminology: Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice' (2012) *The Journal of Criminal Law & Criminology* 102(1): 119-170 at 148.
[65] A. Buchanan and R.O. Keohane, 'The Legitimacy of Global Governance Institutions' in R. Wolfrum and V. Roben (eds.) *Legitimacy in International Law* (Springer, 2008) at 29, and A. Buchannan, 'The Legitimacy of International Law' in S. Besson and J. Tasioulas (eds.) *The Philosophy of International Law* (Oxford University Press, 2010) at 90.
[66] Democratic approach as advocated by S. Besson, 'Institutionalising Global Demoi-cracy' in L.H. Meyer (ed.) *Legitimacy, Justice and Public International Law,* (Cambridge University Press, 2009) at 66.
[67] See Chapter 2, s.2.3.

constituency and its subjects."[68] In the case of the ICTY, Sandholtz concluded that, as an International Criminal Tribunal (ICT), it was considered as holding a "high degree of … 'purposive legitimacy'". Sandholtz based his assertion on the Tribunal's primary purpose, to prosecute persons accused of major war crimes and crimes against humanity, a purpose, which fitted "firmly within a well-established constellation of *values* and norms".[69] He took a legal positivist approach as he referred to the wide acceptance of international human rights law, the underpinning notion of "fundamental dignity and worth of the human person", the prohibition against torture, inhumane and degrading treatment, and the wide recognition of international humanitarian law as accepted by the majority of states belonging to the UN. Sandholtz concluded that "key rules defining war crimes ... are by now seen as applying universally, as customary international law".[70]

Cassese emphasised another category of legitimacy, "universal values legitimacy", which replicated the characteristics of Sandholtz's purposive legitimacy of international criminal tribunals. He distinguished "universal values legitimacy" from purposive legitimacy, as he argued that these universal values of "peremptory norms of international law *(jus cogens)*" may not be held by an institution's constituents (in this case the FRY), but are nevertheless "based on the values common to the whole community within which the institution lives and operates".[71] Although a legally peremptory norm of the duty to prohibit atrocity crimes, including genocide and crimes against humanity, exists, the norm *denouncing* such atrocities, may not exist when some stakeholders do not see these crimes as crimes. As noted by Drumbl, at times of mass atrocity, which requires mass participation, atrocity crimes are not necessarily considered deviant[72] – effectively the norm does not exist in times of war, and not necessarily after the war has concluded (as set out in Chapter 7). In the case of convicted perpetrators returning home, Drumbl provides the example of Nazi war-time perpetrators who noted that "many extraordinary international criminals, who engaged in acts of unfathomable barbarity, are able to conform easily and live unobtrusively for the remainder of their lives as normal citizens".[73]

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[68] S. Vasiliev, 'Theorizing Legitimacy' at 19.
[69] Emphasis added
[70] W. Sandholtz, 'Creating Authority by Council: The international criminal tribunals' in B. Cronin and I. Hurd (eds.) *The UN Security Council and the Politics of International Authority* (Routledge, 2008) at 134.
[71] A. Cassese, 'The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice' (2012) *Leiden Journal of International Law* 25: 491-501 at 492.
[72] M. Drumbl, *Atrocity, Crime and Punishment* (Cambridge University Press, 2007) - "Although widespread acts of extraordinary international criminality transgress *jus cogens* norms, they often support a social norm that is much closer to home … as atrocity becomes more widescale in nature, and more popular, it becomes more difficult to construct participation therein as deviant" at 8.
[73] M. Drumbl, *Atrocity, Crime and Punishment* (Cambridge University Press, 2007) at 8.

In addition to the query raised by Drumbl that the purposive legitimacy of International Criminal Law may not be held by the relevant constituency an ICT has jurisdiction over, some legal scholars have disputed the simple transposition of punishment for crimes of this nature and called for non-punitive mechanisms to deal with atrocity crimes.[74]

Additionally, scholars have noted that purposive legitimacy is too loose a concept - that too many aims and purposes[75] have been ascribed to ICTs due to the multiplicity of stakeholders, who themselves have "different understandings of what the aims and purposes of ICTs are and what they should be".[76] As the following Chapter discusses, ICTs not only became mechanisms for determining guilt and dispensing punishment, but also as contributing to a "restoration of peace",[77] but further to "reconciliation"[78] and to "writing history".[79] Further, these aims and purposes can also change over time in the views of these different stakeholders.[80] This multiplicity of understandings and priorities created tensions between stakeholders in relation to the enforcement of punishment (including its early termination). This tension has been elaborated by de Guzman, writing more broadly in terms of international criminal justice and prosecutorial strategy of the International Criminal Court (ICC). She has noted that there are different stakeholders, who may hold different "visions" (views) on the purposive legitimacy of an international institution, which will affect how they perceive the institution's legitimacy of exercise. In making this argument, she demonstrates the interconnectedness between the normative dimension of legitimacy, the stated aims and value underlying an international institution, and its sociological dimension, noting that "the degree of sociological legitimacy the ICC enjoys ... depends on whether one subscribes to a primarily global or

[74] R. Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law' (2007) *Stanford Journal of International Law* 43: 39 – 94.
[75] From bringing justice to perpetrators, restoring and maintaining peace – as set out in the UNSC establishing the ICTY; to brining justice to victims; establishing the truth; reconciliation – which were stated purposes that the ICTY asserted through its rhetoric with stakeholders, and its judgments.
[76] S. Aambolangvan and T. Squatrito, 'Conceptualising and Measuring the Legitimacy of ICTs' in N. Hayashi and C. M. Baillliet (eds.) *The Legitimacy of International Criminal Trials* (Cambridge University Press, 2017) at 45.
[77] UNSCR 808, 22 February 1993.
[78] J.N. Clark, 'Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation' (2009) *The European Journal of International Law* 20(2): 415-436; J.N. Clark, *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia* (Routledge, 2014); R. Hodžić, 'A Long Road Yet to Reconciliation: The Impact of the ICTY on Reconciliation and Victims' Perceptions of Criminal Justice' in R. Steinberg (ed.) *Assessing the Legacy of the ICTY* (Martinus Nijhoff Publishers, 2011); J. Meernik, 'Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia' (2005) *Journal of Peace Researc*h, 42(3): 271–289 and J. Meernik and J.R. Guerrero, 'Can international criminal justice advance ethnic reconciliation? The ICTY and ethnic relations in Bosnia-Herzegovina' (2014) *Southeast European and Black Sea Studies* 14(3): 383-340.
[79] R.A. Wilson, *Writing History in International Criminal Trials* (Cambridge University Press, 2011).
[80] This multiplicity of stakeholders with varying perceptions of the purposes of an institution (the ICTY specifically) was confirmed in the thesis' findings; there existed multiple understandings of the purposes for the punishment of these crimes. For example, (detailed in Chapter 4, s.4.3) for some stakeholders punishment was for the purposes of incapacitation, for others retribution, for others, deterrence and others moral condemnation. Or a combination of some or all these purposes.

local vision of the Court's work".[81] Her comment recognises that different stakeholders have different visions – there is a global *or* a local vision – the visions, whatever they are, are not the same. The different visions imply different priorities in terms of the most important audiences for legitimacy audiences.[82] Her comment which is of relevance to all international criminal tribunals, calls for the ICC – removed physically from the country, or adjudicated by non-nationals - to be attentive to these local audiences as they conduct their work, in order to achieve sociological legitimacy. De Guzman, in calling for attention to be accorded to the differing priorities, implicitly recognised that legitimacy is not a permanent characteristic.[83] Institutions may have initial purposive legitimacy, but performance legitimacy is required for its perceived legitimacy to continue,[84] as discussed below.

3.4.3. Legitimacy of Exercise/Process Legitimacy/Performance Legitimacy

These three terms[85] referring to the same category (an understanding of what legitimacy is about, and, consequently, a means of assessing it) indicate the two approaches taken to assess the legitimacy of an institution based on their actions: the normative (legitimacy of exercise/process legitimacy) and the sociological (performance legitimacy). As UER is a legal act, conducted by a judge, an examination of its normative legitimacy, that is, its legality is key. Yet, this is only one dimension of legitimacy. Legitimacy encompasses more than adhering to the black letter of the law: were the UERs perceived to be legitimate? As noted in Chapter 1, the legitimacy of exercise is central

[81] M.M. de Guzman, 'The Global-Local Dilemma and the ICC's Legitimacy' in G. Ulfstein N. Grossman, H.G. Cohen, and A. Follesdal (eds.) *Legitimacy and International Courts (Studies on International Courts and Tribunals)* (Cambridge University Press, 2018) at 70.

[82] M.M. de Guzman, 'The Global-Local Dilemma and the ICC's Legitimacy' in G. Ulfstein N. Grossman, H.G. Cohen and A. Follesdal (eds.) *Legitimacy and International Courts (Studies on International Courts and Tribunals)* (Cambridge University Press, 2018) at 62-82.

[83] V. Popovski and N. Turner, 'Legality and Legitimacy in International Order' (2008) *United Nations University Policy Brief* 5, "Legitimacy is a flexible category; it can be gained and it can be lost. It evolves over time and its maintenance requires constant effort" at 4.

[84] W. Sandholtz, Creating Authority by Council: The international criminal tribunals' in in B. Cronin and I. Hurd (eds.) *The UN Security Council and the Politics of International Authority*, (Routledge, 2008) at 140; Y. Shany, Stronger Together? Legitimacy and Effectiveness of International Courts as Mutually Reinforcing or Undermining Notions' (2015) *Hebrew University of Jerusalem Legal Studies Research papers Series*, No. 15-17 at 142; and J. d'Aspremont and E. de Brabandere, 'The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise' (2011) *Fordham International Law Journal* 34. Performance legitimacy is called 'procedural legitimacy' by W. Sandholtz, and 'process legitimacy' by Y. Shany.

[85] Y. Shany, 'Stronger Together? Legitimacy and Effectiveness of International Courts as Mutually Reinforcing or Undermining Notions' (2015) *Hebrew University of Jerusalem Legal Studies Research papers Series*, No. 15-17,– 'exercise'; J. d'Aspremont and E. de Brabandere, 'The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise' (2011) *Fordham International Law Journal* 34 called 'procedural legitimacy' by Sandholtz, 140-150; and 'process legitimacy' by Y. Shany, 142; A. Cassese – "factors can also be used to appraise the legitimacy of an institution once it has been set up' at 493 in A. Cassesse 'The Legitimacy of ICTs and the Current Prospects of International Criminal Justice'.

to this thesis. The focus needs to be simultaneously on normative (the rules and the good procedures in practice) and sociological (stakeholders' perspectives of the practice) legitimacy.

Some legal scholars assess the "legitimacy of exercise" or "process legitimacy" from legal standards, examining institutions' "procedural fairness"[86] and/or the "right process"[87] of decision-making only.[88] These scholars, such as Luban, have argued that, for ICTs, their legitimacy can be obtained based on "the quality of justice they deliver … the manifested fairness of their procedures and punishments."[89] These qualities are based on what he termed "natural justice", which are focused on the fair trial rights of the accused, and, when found guilty, their humane punishment.[90] This focus, however, overlooks the initial first step in ICL, that is, prosecuting those accused of violating ICL. Unlike domestic criminal law, ICL and ICTs adjudicate crimes of a mass scale, and at a very practical level, therefore, ICTs cannot prosecute everybody. In relation to this, there are no existing legal rules that are readily applicable, deemed correct and objective. In relation to the ICC's selection decisions, Obel Hansen noted "the reality remains that the Rome Statute does not set forth clear criteria concerning where and when the ICC should intervene".[91] Secondly, scholarship examining the procedural fairness of these ICTs overlook instances where international law and its rules give broad discretion to its deciders (judges and prosecutors) to apply it. Thirdly, this scholarship ignores the sociological dimension of legitimacy (s.3.6.).

Scholars of ICL who recognise this lack of pre-existing, well-defined and objectively applied criteria are divided as to how to resolve this dilemma. Some have argued that the legitimacy of exercise should be based on "legal criteria" and where there is none, then "either the Prosecutor must develop *ex ante* guidelines or the Court's judges must direct or guide the Prosecutor through their interpretation of the Rome Statute".[92] This argument may answer the second problem Obel Hansen further noted, that is, the broad discretion provided to International Criminal Court (ICC) Prosecutors to open an investigation. They are guided to take into account the "interest of victims" and the

[86] N. Grossman, 'The Normative Legitimacy of International Courts' (2013) *Temple Law Review* 86: 65
[87] T. Franck, 'The Power of Legitimacy and Legitimacy of Power: International Law in the Age of Disequilibrium' (2006) *American Journal of International Law* 100: at 91 cited R. Wolfrum and V. Roben, *Legitimacy in International Law* (Springer, 2008) at 6.
[88] This is indeed the approach undertaken in this thesis' analysis of the ICTY's President's decisions on early release. See Chapter 5.
[89] D. Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law' at 579.
[90] D. Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law'' at 579.
[91] T. Obel Hansen, 'The International Criminal Court and the Legitimacy of Exercise' in P. Andersen, C. Eriksen and B. Viskum (eds.) *Law and Legitimacy* (Djøf Forlag, 2015) at 8.
[92] A. Greenawalt, 'Justice Without Politics? Prosecutorial Discretion and the International Criminal Court' (2007) *International Law and Politics* 39: 583-673, at 586.

"gravity of the crimes"[93] coupled with the fact that the ICC's Rules and Procedure of Evidence (RPE) do not define the concept of gravity. This vagueness was also noted by Danner who additionally referenced the later guidance the Prosecutor is given to open a case, that being the "interests of justice," as a "nebulous" concept. [94] This problem is mirrored in UER and the ICTY's Presidents' wide power to grant a pardon or commutation of sentence based on the "interests of justice and general principles of law."[95] As discussed in Chapter 4, the legal procedures (procedural fairness standard, s.4.4 and s.4.5) was widely assessed by legal scholars in relation to the Tribunal's legitimacy of exercise.[96] This thesis contributes to this field by expanding this analysis into the post-trial stage, as it analyses the Tribunal's Presidents' written decisions and decision-making process of UER (Chapter 5).

This judicial discretion can be a point of contestation which lies beyond the strict positivist approach. Normatively (the moral element), international law generally seeks to advance, for example, treaty goals, including human rights protection.[97] It imposes positive obligations on states, in addition to limiting states' power. International Criminal Law is a clear example, notably the Rome Statute, in which the Treaty clearly stipulates that it aims to end impunity.[98] Some have argued that international judicial discretion for adjudicating atrocity crimes has led to a judicial over-reach. One commentator has critiqued ICTs for what has been deemed a judicial teleological interpretation of crimes. Robinson has critiqued ICT judges in applying a "liberal criminal-law theory [to] provide an adequate tool for analysis"[99] which, he argued, broadens criminal liability to the extent that it infringes on individual rights. He argued that judges should have recognised the "un-controversially generic [principle] that human beings have intrinsic worth, and thus that we cannot use them as mere objects for a lesson to deter others or to convey a socially valuable message".[100]

In contrast to the legitimacy of exercise being contested by legal scholars from a purely normative frame (the morality of judicial decision-making according to their own moral reasoning, for Robinson, that being the moral rightness of the adhering to the rights of the accused), there are

[93] T. Obel Hansen, 'The International Criminal Court and the Legitimacy of Exercise' at 8.
[94] A.M. Danner, 'Enhancing the legitimacy and accountability of prosecutorial discretion at the international criminal court' (2003) *American Journal of International Law* 97(3): 510-552 at 543.
[95] ICTY Statute, Article 28.
[96] See Chapter 4.
[97] D. Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law' at 582.
[98] ICC Preamble, referenced by T. Obel Hansen, 'The International Criminal Court and the Legitimacy of Exercise' in P. Andersen, C. Eriksen and B. Viskum (eds.) *Law and Legitimacy* (Djøf Forlag, 2015).
[99] T. Obel Hansen, 'The International Criminal Court and the Legitimacy of Exercise' at 17.
[100] D. Robinson, 'A Cosmopolitan Liberal Account of International Criminal Law' (2013) *Leiden Journal of International Law* 26: 127–153, at 146.

those who challenge the normative legitimacy of judicial discretion, as they argue that taking a positivist legal approach may conflict with sociological legitimacy. These scholars recognise the sociological value of legitimacy. They value the perspectives of outside, non-legal stakeholders, and argue that their interests should be considered in order to maintain legitimacy. De Guzman articulated this point in terms of the ICC, when she argued that "the ICC's normative and sociological legitimacy derives, at least in part, from the procedures it employs, but any assessment of this "input"[101] [legitimacy of exercise] must take account of the ends to which the Court employs those proceedings", which, in the case of the ICC, is, one could argue, "to advance the local justice agendas of communities most affected by the crimes".[102] Thus, the examination of legitimacy of exercise is only one aspect of normative legitimacy which in turn has to be recognised by the institution's stakeholders.

This sociological approach and its requirement in any assessment of an institution's legitimacy is emphasised by those who utilise the term "performance legitimacy". The word performance implies that the institution's action has a watchful "audience".[103] The institution is being observed, it is aware of this external audience, and it conducts itself with this audience in mind. In relation to ICTs, the ICTY's first President Cassese noted this sociological approach in general terms. In his definition of performance legitimacy, he noted that this category could be appraised.[104] He defined performance legitimacy as "answerability to a founding authority; the transparency of its decision-making, its appointment of organs of the institution … and its accountability to the institution's constituency".[105] An institution's answerability, that is to say its appointment process and accountability are legal aspects of this category of legitimacy; both are important and will be assessed. So too, however, are the notions of two audiences that Cassese implicitly identifies – the institution's founding authority and its "constituency". Cassese does not directly elucidate who makes up these audiences, one being constituents. This thesis refers to a number of the ICTY's constituents as stakeholders, identified and discussed in s.3.6. The performance legitimacy of the

[101] M.M. de Guzman, 'The Global-Local Dilemma and the ICC's Legitimacy' who noted "This process-based legitimacy is sometimes called "input legitimacy"', citing Fritz W. Scrapft 'Legitimacy and the Multi-Actor Polity' in M. Egeberg and P. Lægreid, *Organizing Political Institutions: Essays for Johan P* (Scandinavian University Press, 1999) at 8.
[102] M.M. de Guzman, 'The Global-Local Dilemma and the ICC's Legitimacy' in G. Ulfstein, N. Grossman , H.G. Cohen, A. Follesdal (eds.) *Legitimacy and International Courts (Studies on International Courts and Tribunals)* (Cambridge University Press, 2018).
[103] K. McEvoy and A. Schwartz, 'Judging and Conflict: Audience, Performance and the Judicial Past' in A.M McAlinden and C. Dwyer (eds.) *Criminal Justice in Transition: The Northern Ireland Context* (Bloomsbury, 2015) 157-184, see section 'Audience and Performance' 160-173.
[104] A. Cassese, 'The Legitimacy of ICTs and the Current Prospects of International Criminal Justice' at 493.
[105] A. Cassese, 'The Legitimacy of ICTs and the Current Prospects of International Criminal Justice' at 493.

Tribunal and UER is crucial, and the extent to which these audiences appraise the legitimacy of the exercise of the early release practice.

3.4.4. Outcome Legitimacy

The measure by which "outcome legitimacy"[106] is determined is the extent to which the institution has fulfilled its mandate, i.e. its goal attainment.[107] Thus, outcome legitimacy is directly linked to the institution's purposive legitimacy.[108] In the case of the ICTY, UNSC Resolution 827 set out one primary goal. It stated that the Tribunal's "sole purpose"[109] would be to "bring to justice those responsible for grave violations of international humanitarian law".[110] Yet, the Resolution also noted that the Tribunal would assist in "restoring and maintaining peace in the region".[111] Additionally, the ICTY itself (via its rhetoric and judgments) added new objectives beyond its initial mandate given to it by the UNSC, such as reconciliation and giving voice to victims.[112] Where it has added new objectives, its audiences (including stakeholders in the region and academics) heard them, and did not forget them. Thus, these additional goals were another basis by which the ICTY's legitimacy would be assessed.[113]

Outcome legitimacy may be the most difficult to achieve. An institution usually has goals but there are often external factors, over which the institution lacks control. For example, where an institution lacks the capacity to enforce its power, such as ICTs with no police force, it depends on states to arrest those it indicts. Where states refuse to do so, it has failed in their goal of bringing those responsible to justice. Further, there are matters that affect outcomes that are beyond the institution's control; for example, the death of an indicted person – similarly, the goal of bringing them to justice has failed. In relation to this lack of control of outcomes, some scholars have

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[106] S. Vasiliev, citing Franck, 18. – ICTY – realising their indictments, it did try all 161 – other than those who died; the judgments – Gotovina etc; but it also widens its outcome by introducing notions of victims' justice and reconciliation etc – from subjective criteria to be judged against to totally subjective criteria

[107] ICTY achieved its tangible aims – brought all 161 indictments to prosecution.

[108] This thesis discusses the category of purposive legitimacy more than outcome legitimacy as the Tribunal has met its goal of bringing to justice those it indicted. New more intangible purposes, sometimes reported as goals, were added, such as giving voice to victims and reconciliation; these are less tangible and are thus discussed in relation to purposive legitimacy, the stated purposes rather than specific measureable goals.

[109] UNSCR 827, UN Doc S/RES/827 (1993), adopted 25 May 1993, para. 2.

[110] UNSCR 827, UN Doc S/RES/827 (1993), adopted 25 May 1993, acting under Chapter VII, para. 2.

[111] UNSCR 827, UN Doc S/RES/827 (1993), adopted 25 May 1993, opening declaration.

[112] Detailed in Chapter 4, s.4.3.

[113] In the case of the ICTY, under UNSC 827, it was noted that it was the Tribunal was established "for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law". It aimed to bring about the restoration and maintenance of peace. However, its judgments, and judicial statements, at least at the beginning of the Tribunal's lifetime, articulated that it believed its judgments would further lead to reconciliation. *Prosecutor v. Erdemović,* Case No. IT-96-22-Tbis, 5 March 1998, para.21; and *Dragan Nikolić,* Trail Chamber Sentencing Judgment, 18 December 2003, para. 120.

advocated for a holistic approach and argued that an institution's practice is more important than its specific outcomes. Bodansky articulated this critique and asserted that legitimacy should be conceived of as an ongoing judgment. He argued: "what requires justification is the rule or decision's authority, not its particular content. A person might think the law or decision is misguided ... or even unjust, but still accept it as legitimate".[114] Bodansky's focus is on the bigger picture, of the overall perception of legitimacy which is pertinent for UER by the Tribunal. The practice may immediately be perceived to be unjust but, according to the theories of standards of legitimacy (presented below), these unjust decisions (outcomes) may not undermine legitimacy if the procedures by which they are taken are perceived as legitimate. That is, there are a number of standards by which legitimacy can be measured and, consequently, be obtained and maintained. The majority of these fall within legitimacy of exercise or performance legitimacy.

3.5. Standards to Obtain, Maintain and Assess Legitimacy

As noted at the beginning of this chapter, the majority of institutions exercising power, including international criminal tribunals, generally wish to be legitimate for themselves and to be perceived as legitimate by others.[115] In line with others, this thesis asserts that, to hold sociological legitimacy, a core sense of normative legitimacy is required. This section examines the standards[116] and criteria[117] proposed by scholars that can serve as "justifications of authority"; [118] that is, what promotes and sustains legitimacy.[119] Sociological legitimacy's reliance on normative legitimacy is supported by the "strategic and institutional approaches" to "managing legitimacy" set out by Suchman who comprehensively recommends how institutions can obtain, maintain and regain legitimacy.[120] These strategic approaches were echoed years later by scholars[121] advocating standards which, in their view, could "justify authority"; that is, how international law and international institutions could achieve and maintain legitimacy.

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[114] D. Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law' (1999) *American Journal of International Law* 93 at 602.
[115] M.C. Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) *The Academy of Management Review* 20(3): 571-610 at 594.
[116] A. Buchanan and R. Keohane, 'The Legitimacy of global governance institutions' in L. H. Meyer (ed.) *Legitimacy, Justice and Public International Law*, section entitled ''Competing Standards of Legitimacy' 35-40.
[117] A. Buchanan and R. Keohane 'The Legitimacy of global governance institutions' in L. H. Meyer (ed.) *Legitimacy, Justice and Public International Law* – sub-heading 'criteria' then referring to them as 'attributes' at 42.
[118] D. Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law' (1999) *American Journal of International Law* 93 at 601 cited in H. Takemura, 'Reconsidering the Meaning and Actuality of the Legitimacy of the International Criminal Court' (2012) *Amsterdam Law Forum* Spring Issue 41: 6.
[119] M.C. Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) *The Academy of Management Review* 20(3): 571-610 see 597-599.
[120] M.C. Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) *The Academy of Management Review* 20(3): 571-610.
[121] Legal and moral philosophers and criminologists

This thesis has identified seven relevant standards by which to assess legitimacy.[122] The first two, institutional integrity and procedural fairness, are often said to be objectively assessed. However, outlining standards on which institutions' legitimacy is assessed necessarily encompasses the *act* of assessing, which is ultimately subjective. As asserted by Treves, any "judgment of legitimate or 'illegitimate' is *directly based on value judgments* … legitimacy is more often than not a claim that certain generally shared values should prevail over others in a specific case".[123] For the positivist legalist, these shared values are found in the black letter law, or the written mandate or stated purposes of a particular institution. This is highlighted both in the literature and in this thesis' findings.

3.5.1. Institutional Integrity

The standard of institutional integrity indicates the link between the categories of purposive legitimacy and outcome legitimacy. It falls into both categories of, first - legitimacy of exercise (called performance legitimacy) and second outcome legitimacy. For the legitimacy of exercise or performance legitimacy, integrity can be scrutinised in relation to an institution's ongoing performance. Do its practices align with the purported goals of the institution? This connection is articulated best in the negative by Buchanan and Keohane who caution that "if an institution exhibits a pattern of egregious disparity between its actual performance, on the one hand, and its self-proclaimed procedures or major goals, on the other, its legitimacy is seriously called into question".[124] In this sense, the standard can be assessed through both the normative and the sociological approach to legitimacy. In the second instance, institutional integrity is the extent to which the proclaimed goals or purposes of the institution have been met in the eyes of its stakeholders. As a black and white standard (the direct connection between stated purpose and outcome) institutional integrity is particularly relevant for ICTY's UER. UER prematurely terminated the original sentence the Tribunal meted out. In its judgments, retribution and general deterrence were the primary purposes of sentencing proclaimed by the judges.[125] UER, *prima facie* has the potential to lead to the questioning of the Tribunal's institutional integrity. Retribution is terminated

[122] Institutional Integrity, Procedural Fairness, Procedural Justice, Transparency, Legitimation through Justification, Legitimation through Participation and Acts of Persuasion.
[123] T. Treves, 'Aspects of Legitimacy of Decisions of International Courts and Tribunals' in R. Wolfrum and V. Roben (eds.) *Legitimacy in International Law* (Springer, 2008) at 170.
[124] A. Buchanan and R. Keohane, 'The Legitimacy of global governance institutions' in L. H. Meyer (ed.) *Legitimacy, Justice and Public International Law* (Cambridge University Press, 2009) at 44.
[125] B. Holá, 'Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law' (2012) *Amsterdam Law Forum* 4: at 47. Noting that rehabilitation was the third most cited purpose but referenced to a much lesser extent, and often accorded less significance.

prematurely, and for deterrence, potential perpetrators are sent the message that, if found guilty of atrocity crimes, the sentence promulgated will, more than likely, not be the lived reality.

3.5.2. Procedural Fairness

This broad standard comes under the category of legitimacy of exercise and is a standard by which scholars examining legitimacy from a normative approach assess an institution's legitimacy. [126] The components of the standard derive from administrative law as they are "concerned with the process of decision making".[127] Such process can be based on objective criteria or components. Procedural fairness has three key components – in terms of administrative law they are termed as principles of "openness, fairness, and impartiality: openness requires publicity for the proceedings and knowledge of the essential reasoning underlying the decision; fairness requires the adoption of clear procedures; while impartiality requires freedom from the influence, real or apparent".[128] The first "openness" is transparency (discussed s.3.5.4). The second two standards relate to the decision-maker – their fairness (adhering to clear procedures) and independence (impartiality). These three components in turn lead to an overall quality, that of the final decision. In the normative sense, these can be grounded in taking a positive law approach,[129] that is, that the decisions are reached, fairly and impartially, whilst being transparent.

The second and third components of fairness and independence of the decision-maker are particularly relevant in the case of the ICTY and UER. International judges were chosen, under the Tribunal's founding legal doctrine, presumed to be unbiased (not from the region) and highly-esteemed professionals; thus their decisions would be perceived as fair and "authoritative".[130] Strict legalistic scholars argue that normative legitimacy of procedural fairness has the capacity to counter negative perceptions: "By meeting all the relevant requirements of due process and fair administration of justice, ICTs may to some extent address critiques in view of deficient bases for their establishment, lack of consent and intermittent approval by constituencies".[131] This objective standard of procedural fairness, then, is of relevance to the legitimacy of UER and called for an analysis of the decisions and the process of decision-making. The thesis asked to what extent was

[126] Others too can examine the process. Many of these elements thus link to procedural fairness' sociological standard – procedural justice, discussed in s.3.5.7
[127] M. Adler, 'A Socio-Legal Approach to Administrative Justice' (2003) *Law and Policy* 25(4): 323-352 at 324.
[128] M. Adler, 'A Socio-Legal Approach to Administrative Justice' at 326.
[129] Y. Shany, 'Stronger Together? Legitimacy and Effectiveness of International Courts as Mutually Reinforcing or Undermining Notions' (2015) *Hebrew University of Jerusalem Legal Studies Research papers Series*, No. 15-17: at 16.
[130] Y. Shany, 'Stronger Together? Legitimacy and Effectiveness of International Courts as Mutually Reinforcing or Undermining Notions' at 10.
[131] S. Vasiliev, 'Between International Criminal Justice and Injustice: Theorising Legitimacy' in N. Hayashi and C. M. Baillliet (eds.) *The Legitimacy of International Criminal Trials* (Cambridge University Press, 2017) at 23.

the UER practice procedurally fair? Under which rules was the practice administered, and to what extent did the President who decided on early release act in accordance with these rules?

Finally, these two components (independence and fairness) relate to the overall quality of the decision. Some legal scholars have emphasised the value of procedural fairness and asserted that that "procedural requirements for legitimate authority … will help produce good outcomes".[132] Did the process result in a fair decision? The decision may not necessarily be desirable, but it must be fair.[133] Assessing the procedural fairness depends in large part on the extent to which it is transparent – only if the decision is reasoned and accessible can stakeholders view the fairness of the decision (transparency, s.3.5.4).

3.5.3. Procedural Justice

The standard of procedural fairness can be assessed from the perspective of the layperson as well as the academic. Procedural fairness is an objective standard, which can be assessed on the letter of the law and practice. Procedural justice is a subjective standard, whereby people assess the lived reality of the law; the layperson's perceptions of the decision-maker and the quality of their decisions. Although the view of the layperson, it is generally the view of those directly engaged with the institutions. For example, the standard of the quality of the decision-making based on the stakeholders' perceptions as to whether they were treated fairly in the process, allowed to have their voices heard – is subjective. It is how they feel they are treated - people can be treated in a respectful way but not necessarily feel respected. Concerning the standard of the quality of the treatment, the layman could assess the extent to which they perceived that they have been treated in a dignified manner. Scholars[134] have empirically tested the significance of the standards of procedural fairness, such as clear procedures and impartiality in decision-making.[135]

Tyler and colleagues, based on multiple empirical studies, proposed that those engaged with the law perceive its legitimacy not by its outcomes but by its procedures.[136] What was important, they asserted, was performance legitimacy rather than outcome legitimacy. There are two key elements

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[132] D. Bodansky, 'The Concept of Legitimacy in International Law' in R. Wolfrum and V. Roben (eds.) *Legitimacy in International Law*, referring to a roundtable discussion citing Professor Keohane, at 314-315.

[133] Y. Shany, 'Stronger Together? Legitimacy and Effectiveness of International Courts as Mutually Reinforcing or Undermining Notions' argued that "a judicial decision reflecting a correct application of legal doctrine may fail to generate the desirable outcome" at 16.

[134] Psychologists and criminologists

[135] T. Tyler, *Why People Obey the Law* (Yale University Press, 1990).

[136] J. Sunshine and T. Tyler, 'The Role of Procedural Justice and legitimacy in shaping public support for policing' (2003) *Law and Society Review* 37(3): 513-548, cited in M. Laxminarayan, 'Enhancing trust in the legal system through victims' rights mechanism'(2015) *International Review of Victimology* 21(3): 273-286 at 276.

of Tyler's procedural justice concept - quality of treatment and quality of decision-making.[137] The second element was the quality of decision-making, primarily being that the decision-maker is perceived as independent and fair. This element of Procedural Justice denotes two components of the standard of Procedural Fairness (s.3.5.2).

Tyler's examination of studies validated legal scholars' assertions that procedure does matter. The subjective nature of Procedural Justice (contra Procedural Fairness, s.3.5.2) is highlighted by Tyler's findings that the more participants in the criminal justice system were treated with respect by officials within the criminal justice system,[138] the more institutions' legitimacy was enhanced, independent of negative outcomes in cases.[139] Tyler's concept of procedural justice has been tested and validated by others, legal scholars and victimologists,[140] who have argued that victims should be treated in a dignified manner through and after the process. Tyler has also referenced the other standards of legitimacy - transparency (s.3.5.4) and legitimation through justification (s.3.5.5) in his general conclusions whereby he asserted that "authorities benefit from openness and explanation, because it provides them an opportunity to evidence that their decision making is neutral".[141]

The link between the standard of being treated with respect in procedural justice and shared beliefs (see Acts of Persuasion and M. Walzer, s.3.5.7) to achieve and maintain legitimacy has been made by Bottoms and Tankebe. They have asserted that there exist "in all social contexts … strong shared values about the importance of justice **…** especially procedural justice, in the *actions* of law enforcement officials". Good "quality of interpersonal treatment" requires the decision-maker to treat subjects in a respectful manner.[142] Again, this standard of legitimacy echoes that of basic principles of human rights law, that all persons should be "treated with dignity and respect",[143] a principle that can be extended beyond the trial process to that of the early release practice.[144] Not

[137] T.R Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) *Crime and Justice* 30: 283-357, at 284 cited by A. Bottoms and J. Tankebe, 'Criminology: Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice' (2012) *The Journal of Criminal Law & Criminology* 102(1): 119-170 at 145.
[138] T.R. Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) *Crime and Justice* 30: 283-357 at 300.
[139] T. Tyler, *Why People Obey the Law* (Yale University Press, 1990) and Y. Huo and T. Tyler, *Trust in the Law: Encouraging Public Cooperation d with the Police and Courts* (Russell-Sage Foundation, 2002) and J. Thibault and L. Walker, *Procedural Justice: A Psychological Analysis* (Erlbaum, 1975).
[140] M. Laxminarayn, 'Enhancing trust in the legal system through victims' rights mechanism' (2015) *International Review of Victimology* 21(3): 273-286 at 276.
[141] T.R. Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) *Crime and Justice* 30: 283-357 at 298.
[142] A. Bottoms and J. Tankebe, 'Criminology: Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice' (2012) *The Journal of Criminal Law & Criminology* 102(1): 119-170 at 145.
[143] M. Adler, *Administrative Justice in Context* (Oxford University Press, 2010) referencing T. Tyler's four factors contributing to procedural fairness; including: "opportunities for participation, the neutrality of the forum, the trustworthiness of the authorities and the degree to which people are treated with respect and dignity' at 139.
[144] Indeed, this is the case in many national law jurisdictions where victims continue to be engaged with – notified, opinions sought, in relation to the criminal justice process – decisions on probation. See s.3.6.3.

only have they been the victims of the crime committed by the perpetrator, but the perpetrator can, and often does, return to locations where the victims reside.[145]

3.5.4. Transparency

The standard of transparency immediately connects to the category of performance legitimacy.[146] Transparency is a basic principle under administrative law. In common law jurisdictions, administrative law is understood as an area of law "concerned with the legal control of the exercise of public functions".[147] Outside of the law, extending to any institution's functioning, it can be thought of more broadly as maintaining good governance.[148] Procedural fairness standards can therefore be applied to the exercise of power beyond the state, to international institutions, including international courts[149] and international criminal tribunals. It is a basic component of any institution exercising authority. It has been argued by some that "procedural fairness … is one aspect of legitimacy over which ICTs arguably possess the highest degree of control".[150] Where institutions are removed from those whose lives they affect, procedural fairness could be practised, minimally, through transparency. As Bodansky has asserted "the greater the distance between the ruler [the decision-maker] and the governed, the greater the legitimacy concerns".[151] Thus transparency may ameliorate that concern. In terms of applying this concept to the ICTY and UER, discussed in Chapter 5, transparency was, indeed, a principle of the Tribunal, which itself explicitly linked transparency to the successful maintenance of its legitimacy to its stakeholders: "transparency of the judicial process [which] shall enhance the public confidence in the Tribunal".[152]

Some commentators have expressed caution over transparency, noting that it may enhance legitimacy where decisions are made through good procedure but may damage an institution's

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[145] 'Special Issue: ICTY Celebrities: War Criminals Coming Home' (2018) *International Criminal Justice Review* 28(4).
[146] Indeed, Cassese cites 'transparency' as a means by which performance legitimacy can be obtained; see A. Cassese, 'The Legitimacy of ICTs and the Current Prospects of International Criminal Justice' (2012) *Leiden Journal of International Law* 25: 491-501, at 493.
[147] P. Cane and L. McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2008) at 3.
[148] M. Adler, *Understanding and Analysing Administrative Justice: Administrative Justice in Context* (Hart Publishing, 2010), Part I - Contextual Changes and Their Implications for Administrative Decision Making.
[149] A.M. Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) *American Journal of International Law* 97(3): 510-555; B. Leopard, 'How Should the ICC Prosecutor Exercise His or Her Discretion? The Role of Fundamental Ethical Principles' (2010) *The John Marshall Law Review* 43(3): 553-568; S. Couto and K.A. Cleary, 'The Gravity Threshold of the International Criminal Court' (2008) *American University International Law Review* 23(5): 807-854; N. Grossman, 'The Normative Legitimacy of International Courts' (2013) *Temple Law Review* 86; and C. Stahn, 'Judicial Review of Prosecutorial Discretion: On Experiments and Imperfections' in G. Sluiter and S. Vasiliev (eds.) *International Criminal Procedure: Towards a Coherent Body of Law* (Cameron May, 2009) at 239.
[150] S. Vasiliev, 'Between International Criminal Justice and Injustice: Theorising Legitimacy' in N. Hayashi and C.M. Baillliet (eds.) *The Legitimacy of International Criminal Trials* (Cambridge University Press, 2017) at 21.
[151] D. Bodansky, 'The Concept of Legitimacy in International Law' in R. Wolfrum and V. Roben (eds.) *Legitimacy in International Law* (Springer, 2008) at 316.
[152] Code of Professional Conduct for the Judges of the Tribunal, adopted on 6 July 2016, Preamble.

legitimacy when decisions lack coherence.[153] Nevertheless, it is then recognised that this potential can lead to fairer and better decision-making.[154] This has been recognised in early work exploring the legitimacy of international law and the institutions creating and administering it, and reference was made by Bodansky to the American Administrative Procedures Act. This national legislation required administrative agencies to provide the public, *inter alia*, with notice, as it seeks to establish new rules.[155] By being open, it enables the public to have verifiable grounds to both understand the law and critique it. This argument has being applied to international criminal law and the assertion that prosecutors should develop *ex ante* guidelines to prosecute cases before the International Criminal Court, which "provide a transparent mechanism through which the Prosecutor can explain and justify his actions".[156] Thus, transparency can lead to another standard of legitimacy, "legitimation through justification" (see s.3.5.5).

Transparency can, therefore, keep institutions in check. Firstly, at a sceptical level, it is argued that "publicity is a deterrent against malversation and misconduct by both judges … the basic mechanism of ensuring judicial accountability".[157] A more positive reading would propose that where institutions are aware of an audience observing them, they will act more mindfully in light of the audience: "The administrator is likely to make more reasonable decisions than he or she otherwise might, and is more subject to general public surveillance".[158] Some scholars have argued that institutions should "adopt a norm of publicity and … their decision-making should be 'transparent' and 'open'".[159]

Finally, transparency, it is further proposed, "can serve a legitimating function if it exposes to public discourse the decision makers' understanding of the appropriate goals and priorities for the institution".[160] Thus, transparency can lead to another standard of legitimacy, 'legitimation through justification' (s.3.5.5), which can then, in turn, if justification is successful, lead to 'acts of persuasion' (s.3.5.7). Transparency is a first and minimal step, but it can nevertheless trigger other standards of

[153] M. de Guzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court' (2012) *Michigan Journal of International Law* 33(2) at 298.
[154] M. de Guzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court' (2012) *Michigan Journal of International Law* 33(2) at 299.
[155] D. Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law' (1999) *American Journal of International Law* 93: 612.
[156] A.M. Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) *American Journal of International Law* 97: 97(3): 510-555 at 547.
[157] B. McLachlin, 'Courts, Transparency and Public Confidence - To the Better Administration of Justice' (2003) *Deakin Law Review* 8(1) at 7.
[158] G. Majone, 'Europe's Democratic Deficit: The Question of Standards' (1998) *European Law Journal* 4(5) at 21.
[159] S. Caney, 'The responsibilities and legitimacy of economic international institutions' in L. H. Meyer (ed.) *Legitimacy, Justice and Public International Law* (Cambridge University Press, 2009) at 95.
[160] M. de Guzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court' (2012) *Michigan Journal of International Law* 33(2): 265-320 at 299.

legitimacy, which require positive acts to be undertaken for the benefit of the institution's audiences.

3.5.5. Legitimation through Justification

Transparency is a passive characteristic. However, by being transparent, an institution may wish to explain their acts. Scholars have, therefore, advocated for these active measures to be undertaken. Buchanan and Keohane proposed that "accurate information on how [an] institution works" must be available not only to "designated accountability holders" but also to "those who may contest the terms of accountability". [161] This implies the public who may be affected by the decision at large, and who may challenge it. Information should be actively disseminated rather than simply available. The onus is on the institution to make the decision known, not for the public to discover it. The standard of transparency and active outreach has been taken further by scholars who have asserted that "one especially important dimension of broad transparency is responsibility for public justification".[162] Now, institutions should not only be mindful of how they determine the law, but also how they explain their decisions to the public, to an outside audience. "Institutional actors must offer public justifications of at least the more controversial and consequential institutional policies".[163] This normative legitimacy is mirrored in the literature exploring sociological legitimacy. The equivalent to "controversial decisions" is echoed by Suchman as "disruptive events". Suchman, in his work on "strategies for legitimacy", asserted that institutions may be able to "preserve a modicum of cognitive legitimacy" if they cannot justify [disruptive events], then at least explain them.[164] Providing either a "public justification", or, where one is not possible, explaining or reasoning a disputed outcome, is a good standard of legitimacy of an institution, which may otherwise be called into question. This standard of "public justification" is fitting for the purposes of UER: a practice effectively ending punishment early. It is a practice which could be perceived to be at odds with a mandate to bring to justice the perpetrators, whereby a declared sentence is stated as fitting with that punishment. At a minimum the decision to end that punishment early called for either a justification or an explanation.

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[161] A. Buchanan and R. Keohane, 'The Legitimacy of Global Governance Institutions' in L. H. Meyer (ed.) *Legitimacy, Justice and Public International Law* (Cambridge University Press, 2009) at 48.

[162] A. Buchanan and R. Keohane, 'The Legitimacy of Global Governance Institutions' in L. H. Meyer (ed.) *Legitimacy, Justice and Public International Law* (Cambridge University Press, 2009) at 49 attributing "responsibility for public justifications" to N. Daniels and J. Sabin, 'Limits to Health Case: Fair Procedures, Democratic Deliberation, and the Legitimacy Problem for Insurers' (1997) *Philosophy and Public Affairs* 26: 303-350.

[163] A. Buchanan and R. Keohane, 'The Legitimacy of Global Governance Institutions' in L. H. Meyer (ed.) *Legitimacy, Justice and Public International Law* (Cambridge University Press, 2009) at 49.

[164] M.C. Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) *The Academy of Management Review* 20(3) at 598.

3.5.6. Legitimation through Participation

The above standards are those proposed by scholars generally for pragmatic reasons of maintaining legitimacy in an institution's current and on-going exercise of power. At the more abstract level, scholars have proposed standards that are more idealistic. These foundations are, in part, due to the fact that international law lacks democratic validation. With no international parliament, international law "lacks a legislature".[165] As, however, democracy is, as argued by many, "the touchstone of legitimacy",[166] proposals for legitimation through participation reflect the principle of the *demos* - participation by the people. These proposals revolve around "communicative aspects of legitimisation".[167] From the legal perspective, the approach to international and non-accountable institutions of power, such as the World Bank, which develop rules that affect individuals, legitimacy can be achieved and maintained through active communication, i.e. "increased public participation".[168] For international courts and tribunals which (especially in the early years of the ICTY), through their exercise of power (including developing and amending their RPE and writing judgments), effectively create rules and policies that filter down to and affect people in states, the communication standard, as a form of public participation, is articulated in a two-stage approach: "First, legal persons whose international legal rights and duties are at issue in international court proceedings must have the right to present their views. Second, to the extent international courts are making law or policy, those potentially affected should have the ability to participate".[169] International Criminal Law (ICL) has a global audience, in effect, bringing to account those accused of crimes against humanity. This means that potentially all human beings, those who may be perpetrators or those who are the victims of such crimes, are the audience to which this "no impunity" message is to be delivered. This stance is also proposed by scholars, who have argued that the ICC Statue is an international treaty, signed by states addresses all citizens, which includes

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[165] V. Popovski and N. Turner, 'Legality and Legitimacy in International Order' (2008) *United Nations University Policy Brief* 5 at 4.

[166] D. Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law' (1999) *American Journal of International Law* 93 at 599.

[167] J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by W. Rehg (The MIT Press, 2nd edition, 1996) at 110 cited in S. Vasiliev, 'Theorising Legitimacy' 14.

[168] S. Charnovitz, 'Transparency and Participation in the World Trade Organisation' (2004) *Rutgers Law Review* 56: 927 at 928 cited in J. d'Aspremont and E. De Barbandere, 'The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise' (2005) *Fordham Journal of International Law* 226. Although they also note that Legitimacy via NGO representation is not in itself a remedy to legitimacy because they too are undemocratic – 227.

[169] N. Grossman, 'The Normative Legitimacy of International Courts' (2013) *Temple Law Review* 86: 104.

"victims, afflicted populations and perpetrators".[170] As detailed below (s.3.6), ICL has a global audience, but not all members of the audience are necessarily stakeholders; academics, for example, are one audience, but their lives (rather than their chosen careers) are not directly affected. Stakeholders are those who have a stake, they affect or are affected by the institution's exercise of power itself.

The initial stage is representation, and the second is participation. Participation denotes an interaction, an active communication. This would be between the law and decision-maker and the people affected by these laws and decisions. Theorist Habermas argued that laws and norms generally should be formulated not by those in power but by all those affected. This is the "general discourse principle" whereby "those norms … can be justified if and only if equal consideration is given to the interests of all those who are possibly involved".[171] In a world of 7.5 billion people,[172] it is difficult to realise this ideal, and Habermas' work did not provide a solution to how compromise may be reached. This has been articulated by others (below, s.3.5.7).

3.5.7. Acts of Persuasion

Communication and participation requiring "equal consideration" implies that the communication should be more than voices sounding past each other. Further, participation will not always provide a solution; there are occasions when consideration of one or more participants will overrule others. This is specifically an obstacle for international law, where norms held by the institution, the decision-makers, may not be "embedded in a defined community"[173] and thus not simply accepted.

In these cases, scholars have asserted that, for such an institution, "legitimacy … ultimately depends on [their] capacity to persuade observers that the exercise of its power … is consistent with the application of rules that are universal in nature".[174] A sense of universality can derive from

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[170] H. Takemura, 'Reconsidering the Meaning and Actuality of the Legitimacy of the International Criminal Court' (2012) *Amsterdam Law Forum* 41 Spring Issue at 6 citing Jaya Ramji-Nogales, Designing Bespoke Transitional Justice: A Pluralist Process Approach (2010) *Michigan Journal of International Law* 32(1): 11.

[171] J. Habermas, '*Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*', translated by William Rehg (The MIT Press, 2nd edition, 1996) at 108.

[172] World Bank 2017 figure: https://data.worldbank.org/indicator/sp.pop.totl

[173] M.M. deGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court' (2012) *Michigan Journal of International Law* 33: at 277.

[174] M.J. Struett, 'The Politics of discursive legitimacy underlying the dynamics and implications of prosecutorial discretion at the International Criminal Court' in S.C. Roach, *Governance, Order and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court* (Oxford University Press, 2009) at 107, cited in H. Takemura, 'Reconsidering the Meaning and Actuality of the Legitimacy of the International Criminal Court' (2012) *Amsterdam Law Forum* 41 Spring Issue at 9.

"the degree to which those norms can be justified through rational argument".[175] Their argument is that principles will only become norms when they are justifiable. In relation to ICL, some scholars have recognised the importance of persuasion required for international norms. As noted above (s.3.5.4 transparency) scholars who have advocated for the ICC's Prosecutor to develop guidelines determining which cases to pursue, have further argued that guidelines may be able to be a means of communicating norms, thus going beyond a mere justification for their approach. These justifications become acts of persuasion, and, thus, may advance norms. However, scholars note that these acts of persuasion are not a one-way communication; communication is a first step. This is articulated best by de Guzman: "The [ICC]'s decision makers would announce the norms to which they have accorded priority in explaining the grounds for their selection decisions … relevant audiences … would then react, providing the decision makers with feedback on their normative choices. Decision makers would incorporate such feedback into their future decisions. Through this dialogic process, incremental progress would ideally be made toward greater consensus on norms and priorities".[176] Thus, de Guzman argued that the standards of legitimation through participation and acts of persuasion are upheld at the initial stage of the enforcement of international criminal law – case selection for prosecution, and they remain pertinent at the latter stage, including when perpetrators are considered for early release from imprisonment.

It has been recognised that the "concept of shared values does … have its considerable complexities".[177] This may be the case of UER, as well as more broadly in the case of international criminal justice, where international judges are developing rules not necessarily based on values held by the community, where those practices have an impact, and further acts of persuasion may be required. Tankebe and Bottoms highlighted this challenge, and developed proposals by Walzer.

Walzer argued that every society holds "thick" and "thin" moralities. All societies have specific (thick) moralities in how they consider themselves and their morality; "they will aim at what is best for themselves, what fits with their history and culture".[178] Nevertheless, Walzer posited that most

[175] M.J. Struett, 'The Politics of discursive legitimacy underlying the dynamics and implications of prosecutorial discretion at the International Criminal Court' S.C. Roach, *Governance, Order and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court* (Oxford University Press, 2009) at 112, referencing the arguments made by F. V. Kratochwil, *Rules, Norms, and Decisions: on the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs,* Chapter 4: 'The force of prescriptions: Hume, Hobbes, Durkheim and Freud on compliance with norms' (Cambridge University Press, 1989).
[176] M.M. de Guzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court' (2012) *Michigan Journal of International Law* 33 at 318.
[177] A. Bottoms and J. Tankebe, 'Criminology: Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice' (2012) *The Journal of Criminal Law & Criminology* 102(1): 119-170 at 142.
[178] M. Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (University of Notre Dame Press, 1994) at 3.

"communities also possess a way of talking to people abroad, across different cultures, about the thinner life [that different groups] have in common" and, crucially, he asserted that that "there are the makings of a thin and universalist morality inside every thick and particularist morality".[179] These thin moralities encompass "basic prohibitions – of murder, deception, betrayal and gross cruelty – that the law specifies".[180] Additionally, they encompass broad notions of "truth and justice". In terms of justice he argued that this morality was universal, "simple enough: an end to arbitrary arrests, equal and impartial law enforcement".[181] Based on this thin morality, Bottoms and Tankebe argued that these common values should be emphasised by leaders of institutions. Acts of persuasion should occur whereby institutions of power seek out commonalities and persuade stakeholders to respect their decisions. They recommended that "power-holders in an increasingly globalised world … identify and articulate that shared thin morality, and negotiate its acceptance among a number of communities who espouse different thick moralities".[182] This standard of legitimacy may be applicable in relation to the UER of perpetrators by the ICTY: to communicate their decisions (a first step would be transparency) and, further, to appeal to some shared sense of morality that could persuade these stakeholders that UER was legitimate.

The notion of commonalities across different groups echoes Beetham's reference to "shared beliefs". Beetham's framework for the "legitimation of power" asserted that rules must be justified according to these shared beliefs between the decision-maker and its constituents (stakeholders). The notion of shared beliefs connects to the argument that rules derive from morals. Thus, morals are frequently embedded within the rules. Alongside this, advocates of Procedural Justice (s.3.5.3), have highlighted shared values applicable not only to the law but also the procedures within which they are manifested. Acts of communication and legitimation are embedded in every aspect of an institution's exercise of power.

3.5.8. Normative Legitimacy as Core to Achieving Sociological Legitimacy

What the latter standards examined above (transparency, legitimation through justification, legitimation through participation and acts of persuasion) have highlighted is the value of communication. For a law, a practice, and the institution itself to be perceived as legitimate, it

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[179] M. Walzer, *Thick and Thin: Moral Argument at Home and Abroad*, at xi, (University of Notre Dame Press, 1994) cited in A. Bottoms and J. Tankebe, 'Criminology: Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice' (2012) *The Journal of Criminal Law & Criminology* 102(1): 119-170 at 143.
[180] M. Walzer, *Interpretation and Social Criticism* (Harvard University Press, 1987) at 23-24.
[181] M. Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (University of Notre Dame Press, 1994) at 2.
[182] A. Bottoms and J. Tankebe, 'Criminology: Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice' (2012) *The Journal of Criminal Law & Criminology* 102(1): 119-170 at 143.

generally needs to communicate that sense of legitimacy. Further, legitimacy is not an all or nothing. These standards of legitimacy, just as the categories of legitimacy (purposive, of exercise or performance, and of outcome) are not necessarily assessed in isolation. Therefore, where one standard is weak, another can bolster an institution's legitimacy; some, indeed, may be more important in a given context. The standards and categories are, just as with the dimensions of legitimacy (normative and sociological), deeply intertwined.[183] The social context encompasses the people who make up that social element, that is, the stakeholders in legitimacy, in the acts of communication. In addition to scholars and decision-makers, the decisions affect society and, therefore, their belief in the institution's legitimacy matter. These categories of legitimacy, or as Vasiliev terms them "objects of justification,"[184] should be assessed, not only by the scholar, but by the stakeholders upon whose lives they impact. Outlined further below (s.3.6) are the stakeholders relevant to this thesis' exploration of the legitimacy of practice of UER (Chapters 5, 6, 7 and 8).

3.6. The Stakeholders who Perceive Institutions' Legitimacy

3.6.1. Identifying Stakeholders

Identifying the categories by which legitimacy can be assessed raises the question - "whose views are the litmus test [for legitimacy]?"[185] The word "views" echoes the category of performance legitimacy and implies that there is more than one audience. For the purposes of this thesis, the audiences whose views are the litmus test are the decision-makers and those engaged in the exercise of the institution's power (insiders), and those directly affected[186] by these decisions (outsiders). Both these insiders and outsiders are audiences, and are described here as stakeholders;[187] some scholarship refers to them as constituents.[188] UNSC Member States are also stakeholders in the ICTY as they are the "founding authority",[189] and although they are not decision-makers, they hold a certain amount of control over the decision-makers (Chapter 4, s.4.2.1). Audiences can include a number of other groups, not directly affected by the decisions, such as academics and citizens of other countries. This section sets out the different stakeholders that have

[183] D. Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law' (1999) *American Journal of International Law* 93 at 602.
[184] S. Vasiliev, 'Between International Criminal Justice and Injustice: Theorising Legitimacy' in N. Hayashi and C. M. Baillliet (eds.), *The Legitimacy of International Criminal Trials* (Cambridge University Press, 2017) at 82.
[185] S. Vasiliev, 'Between International Criminal Justice and Injustice: Theorising Legitimacy' in N. Hayashi and C. M. Baillliet (eds.), *The Legitimacy of International Criminal Trials* (Cambridge University Press, 2017) at 80.
[186] Whether they wish to be or not.
[187] J. Ramji-Nogales, 'Designing Bespoke Transitional Justice: A Pluralist Process Approach' (2010) *Michigan Journal of International Law* 32(1): at 11 – "afflicted populations, perpetrators and political elites as societal stakeholders in the post-conflict societies", cited in H. Takemura, at 6. See s.3.6.
[188] Cassese, Vasiliev and Takemura.
[189] A. Cassese, see s.3.4.3

been considered as relevant (and accessible)[190] in assessing the perceived legitimacy of the practice of UER.

First outlined are the relevant stakeholders in the legitimacy discourse more generally. Barker, who wrote about states and state leaders (institutions exercising power) asserted that "the most important member of the audience is the emperor himself".[191] At the core, those within the institution itself are stakeholders, they direct the institution's practice, and, to convince others of their legitimacy, would generally require they perceive themselves as legitimate. Suchman, speaking at the broadest level of legitimacy for institutions exercising power, denoted the "immediate audience" as "those whose lives are affected by the exercise of power".[192] He explained that these "audiences are likely to become constituencies" who "scrutiniz[e] organizational behaviour to determine the practical consequences, for them".[193] In relation to international legal institutions, there are further audiences, beyond the immediate power-holder and those directly affected by the exercise of power. Buchanan and Keohane articulate this and further imply the requirement that an assessment of legitimacy should also explore perceptions of legitimacy. They have argued that "legitimacy requires not only that institutional agents are justified in carrying out their roles, but … that those to whom institutional rules are addressed have … reasons to comply with them, and that those within the domain of the institution's operations have … reasons to support the institution or at least to not interfere with its functioning".[194] This assertion speaks to the requirement to interrogate the reasons as to why an institution and its actions are supported. This is where the complementary nature of legitimacy of a rule and the overall practice is highlighted, i.e. an institution can be legitimate to the extent to which it is perceived as such by its stakeholders. This reflects Beetham's assertion (noted s. 3.3) that "power is acknowledged as legitimate to the extent that: it [has] legality, [holds] normative justifiability and [has] legitimation".[195] This interconnectedness meant that, to understand the sociological legitimacy of UER and any impact this had on the Tribunal's overall legitimacy, required asking the stakeholders their perceptions on the

[190] Chapter 2, s.2.4 addresses the issue of accessibility in terms of the thesis' field research.
[191] R. Barker, *Legitimating Identities: The Self-Presentations of Rulers and Subjects* (Cambridge University Press, 2004) at 5.
[192] R. Barker, *Legitimating Identities: The Self-Presentations of Rulers and Subjects* (Cambridge University Press, 2004) at 5.
[193] M.C. Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) *The Academy of Management Review* 20(3): 571-610 at 578.
[194] A. Buchanan and R. Keohane, 'The Legitimacy of Global Governance Institutions' (2006) *Ethics & International Affairs* 20(4): 405-437 at 411.
[195] D. Beetham 'Revisiting Legitimacy, Twenty Years On' in J. Tankebe and A. Liebling (eds.) *Legitimacy and Criminal Justice: An International Exploration* (Oxford University Press, 2013) at 20. *Hereinafter,* Beetham, 'Revisiting Legitimacy'.

practice.[196] The following section outlines why the thesis chose to study these stakeholders' perceptions.

3.6.2. Stakeholders in Criminal Justice Systems

Generally, a criminal trial, domestic or international, requires the following individuals: an accused[197] and a victim, the two individuals who have "triggered"[198] the case; a prosecutor, who has brought the case before the court; a defence attorney, who provides assistance to the accused; witnesses who testify to either support or counter the prosecution's case; the trial chamber staff who administer procedural matters for the duration of the trial; and judges (or jury) who rule on the case. Behind the trial, there are judges' clerks who provide research and assist in writing judgments; court reporters who summarise the details and procedures of the case; staff who provide assistance to witnesses, prison or security staff who guard the accused, and the media who follow and report on the case, where permitted. For international criminal trials, there are interpreters who enable communication between all of these actors. With the exception of the perpetrators, [199] security personnel, interpreters, and the media, all of these actors were considered as stakeholders whose opinions were sought as to the legitimacy of the practice of UER and its impact on the ICTY overall.

3.6.3. Victims of Crime as Stakeholders

The thesis' identification of victims as key stakeholders in assessing the practice of the ICTY's legitimacy stems from the perspective, shared by many others, that international criminal justice should "not be perceived and approached as an end itself, but as a means to deliver justice to those directly affected".[200]

At the domestic level, the concept of victims of crime being key stakeholders in the criminal justice system was posited by criminologist Nils Christie. He argued that, as of 1977, in the Western criminal

[196] In addition to the research's assessment of the UER's legality, to what extent were there any normative understanding, some shared beliefs, held by the insiders (decision-makers and staff at the ICTY) and the outsiders (those affected by the exercise of their authority) that could justify UER?

[197] The accused and the perpetrator as stakeholders have been addressed comprehensively by Duff (accused) and Mulgrew (perpetrators). It is beyond the scope of this thesis.

[198] N. Christie, 'Conflicts as Property' (1977) *The British Journal of Criminology* 17(1) at 3.

[199] At a practical level, due to limited time and resources, it was not possible to include perpetrators within the scope of this thesis. Furthermore, there has already been empirical research undertaken directly with perpetrators (Mulgrew) which has in part engaged with the perpetrators and their perceived perceptions of the ICTY's legitimacy in the sense of their respect for its judgments. Additionally, from a normative perspective, the thesis sought the opinions of those whom this author believed may have altered their position on the ICTY, that is, those who would normatively have perceived the ICTY as legitimate, in the sense that they had perceived the punishment of perpetrators as justified.

[200] R. Letschert, R. Haveman, AM. de Brouwer, A. Pemberton (eds.) *Victimological Approaches to International Crimes* (Intersentia, 2011) at 623.

(common law) justice systems, the victim of crime had "lost participation in his own case".[201] The crime (which Christie terms "conflict") which had triggered the case had been stolen by the state (*R. v. the defendant*) which had effectively made the victim the "heavy loser" in the criminal justice system.[202] Christie argued that, in the trial process, the focus is on the "offender", those accused of crime, not the victim and their harm. This, he argued, "reduced the victim to a nonentity". Victims are represented by a Prosecutor and only speak when called to do so, to testify to crimes, the wrong of the perpetrator, not to their harms resulting from those crimes. He concluded that the "criminal conflicts have … become other people's property – primarily the property of lawyers".[203] Christie referenced empirical research of victims in the UK justice system which supported his assertion,[204] that "victims had been sorely neglected by the criminal justice system".[205]

In response to this widespread belief of victims being side-lined by the criminal justice system, came a number of victims' rights movements, in several jurisdictions and continents, throughout the 1970s and 1980s. These movements were successful to the extent that there is now widespread recognition of victims as stakeholders with rights in domestic criminal justice systems which include the *right* to be consulted in a decision whether or not to prosecute, bail decisions, acceptance of a plea, a sentence and a decision on parole.[206] These concepts and beliefs that victims are stakeholders took legal shape in the form of soft law, the UN Declaration on Victims, 1985 and the Council of Europe's Recommendation on "The Position of the Victim in the Framework of Criminal Law and Procedure" 1985.[207] This thesis, to the extent possible, set out to find how far any of these rights were considered or put into practice at the ICTY in the process of UER; that is, if the victim-witnesses had been notified in the UER of a perpetrator, as would have been the case in a number of the EU or EEA countries where they served their sentence.[208]

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[201] N. Christie, 'Conflicts of Property' (1977) *British Journal of Criminology* 17(1).
[202] N. Christie, 'Conflicts of Property' (1977) *British Journal of Criminology* 17(1) at 7.
[203] N. Christie, 'Conflicts of Property' (1977) *British Journal of Criminology* 17(1) at 5.
[204] A. Ashworth, 'Victim Impact Statements and Sentencing' (1993) *Criminal Law Review*, citing J. Shapland, J. Willmore and P. Duff, *Victims in the Criminal Justice System* (Gower Publishing, 1985) at 7.
[205] A. Ashworth, 'Victim Impact Statements and Sentencing' (1993) *Criminal Law Review* 1: 498–509.
[206] A. Ashworth, 'Victim Impact Statements and Sentencing' (1993) *Criminal Law Review* 1 and see: https://e-justice.europa.eu/content_rights_of_victims_of_crime_in_criminal_proceedings-171-en.do [accessed 02/12/2019] EU portal through which the majority of EU Member States set out their conformity with the Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.
[207] Recommendation No. R (85) 11 of the Committee of Ministers to the Member States on the Position of the Victims in the Framework of Criminal Law and Procedure (Adopted by the Committee of Ministers on 28 June 1985 at the 387th meeting of the Ministers' Deputies) see: https://www.coe.int/en/web/ccpe/documentation/recommendations
[208] With the exception of Denmark, the countries in which the perpetrator was held and released from provide the victims of serious crimes, which would be expected to cover war crimes that their victims can request to be informed of their release.

Under this legal framework, the assumption is frequently made in the field of international human rights, transitional justice and victimological scholarship that victims are key stakeholders, and their perceptions of legitimacy matter in the overall legitimacy assessment of international criminal justice. The broad range of literature assessing, often critically - by both scholars and internal stakeholders; the treatment of victims by the ICTY and the perceptions of the ICTY by victims' communities is reviewed in the following chapter,[209] testifying to the statement that, "it seems evident that one stakeholder group are the victims of the crimes over which the tribunals have jurisdiction".[210] Therefore, this thesis sought to question the extent to which ending this retributive justice early had had an impact on the victim-communities' views of the Tribunal.

Before turning to the site of justice, or injustice, let us return to where the criminal justice process began, with the stakeholders at the Tribunal itself.

3.6.4. Insiders' Perspectives of Legitimacy

As noted above, institutions of power, including the ICTY, wish to be perceived as legitimate, and routinely engage in acts of justification for their authority. Before being able to assert that the institution is legitimate, it surely must have a sense of its own legitimacy – that is, a belief that it is justified in exercising its authority. If an institution does not have a sense of its own legitimacy, how can it expect others to respect its decisions? The notion of self-belief being a pre-requisite is articulated by Juan Linz who argued that "the legitimacy of a democratic regime *rests* on the belief in the right of those legally elevated to authority to issue certain types of commands [and to] expect obedience".[211] This statement also prompts two questions of *who* are "those legally elevated to this position of authority who can issue such commands" and "*what* commands"? The ICTY, first and foremost, was mandated to "bring to justice those responsible" for atrocity crimes; as a criminal tribunal, the act of bringing to justice meant a determination of guilt for those responsible. Those are the commands that the institutions wish to be perceived as legitimate, their ultimate exercise of power. Therefore, it was the judges who were the individuals enshrined with legal authority to render the final determination on the guilt of those deemed responsible and to pass sentence. In relation to legitimacy, it has been argued that "constructing and maintaining professional and personal esteem and a sense of professional legitimacy is a fundamentally social process which

[209] Chapter 3, s. 3.3.
[210] M. Heikkila, 'The Balanced Scorecard of International Criminal Tribunals' in C. Ryngaert (ed.) *The Effectiveness of International Criminal Justice* (Intersentia, 2009) at 33.
[211] J. Linz, 'The Breakdown of Democratic Regimes, Crisis Breakdown and Reequalibrium' (Johns Hopkins Press, 1978) cited in R. Barker at 33. Emphasis added.

requires validation from others".[212] Consequently, then, judges have to adhere to their own sense of legitimacy as they perform to their audiences. In relation to criminal justice and perceptions of self-legitimacy in the national setting, there is a significant body of literature which has explored judicial behaviour in light of the "various audiences judges perform *to* or *for*".[213]

The Office of the Prosecutor (OTP) was another primary performer. They engaged directly with the Tribunal's various stakeholders, especially victims. They have initial and ongoing engagement with victims: questioning them for evidence, recording their statements, and choosing which victims would come to The Hague to testify. Other staff (such as the Victim and Witness Unit, the staff of the Registry, Media and Communication) are also these insiders, described by Takemura as "constituent members".[214] Rather than performing, they may actively engage with external audiences, such as the media, individuals of international bodies, and the public of the region where the crimes were committed. In the context of legitimation, the process by which institutions create and sustain legitimacy, Barker asserted that "when rulers legitimate themselves, they give an account of who they are, in writing, in images, in more or less ceremonial actions and practices".[215] Tribunal judges do this through their written judgments; other internal stakeholders do so through their engagement with the Tribunal's outside stakeholders.

3.6.5. The War-affected Populations as Stakeholders in International Criminal Justice

At a broad and philosophical level, and implied in part above by the Tribunal itself, the Tribunal sought to bring justice to victims and to all other people involved in general, that is, the wider post-conflict society. This fits into Raz's understanding of a legitimate authority which serves the society it

[212] K. McEvoy and A. Schwartz, 'Judging and Conflict: Audience, Performance and the Judicial Past' in A.M. McAlinden and C. Dwyer (eds.) *Criminal Justice in Transition: The Northern Ireland Context* (Oxford University Press, 2015) 158-185, at 161 referencing C. Johnson, T. Dowd, and C. Ridgeway, 'Legitimacy as a Social Process' (2006) *Annual Review of Sociology* 32: 53 at 5.

[213] K. McEvoy and A. Schwartz, 'Judging and Conflict: Audience, Performance and the Judicial Past' at 161 citing T.J. Miceli and M.M. Cogel 'Reputation and Judicial Decision-Making' (1994) *Journal of Economic Behavior and Organization* 23: 31; F. Schauer 'Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior' (1999) *University of Cincinnati Law Review* 68: at 615; N. Garoupa and T. Ginsburg 'Judicial Audiences and Reputation: Perspectives from Comparative Law' (2008) *Columbia Journal of Transnational Law* 47: 451.

[214] H. Takemura, 'Reconsidering the Meaning and Actuality of the Legitimacy of the International Criminal Court' 41 *Amsterdam Law Forum* Spring Issue (2012) 6. In following the logic of internal stakeholders along with Barker's concept of self-legitimation and the audiences to which power-holders prioritise their acts of self-legitimation, the thesis sought the opinion of other staff at the ICTY.

[215] R. Barker, *Legitimating Identities: The Self-Presentations of Rulers and Subjects* (Cambridge University Press, 2004) at 35. In practice, at the ICTY, this legitimation was undertaken not only by the judges in their written decisions and public statements, but staff (as above) who came into direct contact with the various stakeholders in the region.

governs.[216] In the case of the ICTY, it prosecuted perpetrators from the region, for people, the victims, in the region; thus, post-conflict society is a key stakeholder in the justice it dispensed. Further, atrocity crimes include more than the direct victims before the Tribunal due to perpetrators' mass victimisation, due to the fact that the motivation of the crimes was often based on the notion of the other; in short, the atrocity crimes occurred as part of a societal breakdown. As will be discussed in the following chapter, the ICTY became a *de facto* transitional justice mechanism which dealt with this societal breakdown. Scholars capture this characteristic as they frequently discuss the ICTY within a framing of transitional justice rather than explicitly as international criminal justice.[217] This understanding requires that "rebuilding rule of law [becomes] a key element of the reaction to international crimes".[218] Consequently, effective transitional justice mechanisms are those which "successfully reconstruct social norms in opposition to mass violence" and that the "local population must perceive such mechanisms as legitimate before it will internalise these norms these mechanisms represent". [219] This statement is pertinent to the practice of early release for perpetrators of atrocity crimes and the above (s.3.2) noted query that the practice raised: was it a deliberate practice under which the ICTY was developing new norms to forgive perpetrators of atrocity crimes, by treating them as ordinary crimes, or in fact, more favourably? Did these norms filter down to the ICTY's successors in the criminal justice process in BiH, the judges and lawyers who were working on war crimes cases at the domestic level? To what extent did they believe the practice of UER was legitimate, and did the practice impact on their overall perceptions of the Tribunal's legitimacy? To what extent would this practice of UER be repeated in the war crimes cases prosecuted in BiH itself?

3.7. Conclusion

This chapter has distinguished the two main approaches to legitimacy, its normative (encompassing both legal and moral elements) and sociological dimensions, demonstrated how interconnected they

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[216] J. Raz, *The Morality of Freedom* (Oxford University Press, 1988) at 53 and 56 cited S. Aambolangvan and T. Squatrito, 'Conceptualising and Measuring The Legitimacy of ICTs' in N. Hayashi and C. M. Baillliet (eds.) *The Legitimacy of International Criminal Trials* (Cambridge University Press, 2017) at 50.

[217] D. Luban 'Fairness to Rightness: Jurisdiction, Legality and the Legitimacy of International Criminal Law' at 574 who argued that prosecuting perpetrators of atrocity crimes – "deals with "extraordinary violence, symmetrically perpetrated, and typically on a large scale … instead of being normal parts of the daily function of government, international criminal trials occur after governments have fallen or been radically altered" therefore TJ, and "therefore trials take on political overtones". Therefore "foundational question about what justifies punishment takes on different configurations in ICL".

[218] A. Pemberton, R.M. Letschert, A.M. de Brouwer and R.H. Haveman, 'Coherence in International Criminal Justice: A Victimological Perspective' (2015) *International Criminal Law Review* 15: 344.

[219] J. Ramji-Nogales, 'Designing Bespoke Transitional Justice: A Pluralist Process Approach' (2010) *Michigan Journal of International Law* 32(1) at 71 cited in S. Ford, 'A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanism' (2012) *Vanderbilt Journal of International Law* 45(2): 405-476 at 407.

are, and underscored why an assessment of an institution's legitimate exercise of power should understand both dimensions. It has also explained why sociological legitimacy is required for institutions of power which do not have independent coercive force; their ability to exercise authority rests on stakeholders' acceptance of their legitimacy, via perceptions of the institution's normative legitimacy (both legal and moral elements) based on its performance – its exercise of power. Further, for institutions which seek to advance norms (over time), legitimacy is fundamental for war-affected societies to internalise these norms.[220] The chapter then outlined the relevant categories and standards of legitimacy that the thesis examines in its assessment of UER. Just as normative and sociological legitimacy are complementary, so too are many of the standards of legitimacy. It has clarified why the normative legitimacy assessment of the practice has necessitated the examination of its sociological legitimacy by the relevant stakeholders. It has identified the stakeholders whose assessments of these categories and standards were obtained and analysed, and explained why.

The thesis set out to explore the normative and sociological legitimacy of UER from the viewpoint of different stakeholders.[221] These findings are analysed in Chapter 5, assessing the normative legitimacy of the practice – its legality; then the sociological legitimacy challenges raised by the practice's stated reasoning - Chapter 6. The repercussions of UER on its key stakeholders are set out in Chapters 7, moral condemnation negated, and 8, victims' sense of injustice. In doing so, the study contributes to the literature which has explored the ICTY's normative and its sociological legitimacy; that is the exercise of its legal powers and perceptions of the Tribunal by stakeholders in the region, to which we will now turn.

[220] M. Drumbl, "I would welcome a policy whereby international institutions sentenced differently based on incorporation of national norms … This policy is particularly desirable when national positive law instruments, or court activity, represent what populations on the ground envision as legitimate sentencing practice … accommodating representative national sentencing practices is intimately connected to the meaningfulness of sanction" in *Atrocity, Punishment and International Law*, (Cambridge University Press, 2007) at 162-163.

[221] In doing so it also hoped to identify if there existed any shared values as to the justifiability of the practice.

Chapter 4: Assessments of the ICTY's Legitimacy

4.1. Introduction

This chapter examines the literature which has assessed the ICTY's legitimacy: its normative (both legal and moral elements) and sociological dimensions. Observers[1] have analysed specific categories of its legitimacy and appraised its legitimacy on different standards. Thus, in outlining these legitimacy assessments specific to the ICTY the chapter builds on the preceding chapter which defined the concepts of legitimacy: its dimensions (and approaches by which it is explored), its categories and the standards used to assess the legitimacy of institutions of power more broadly.

As a socio-legal thesis, focusing on the law in context[2] in addition to the law itself, this chapter examines the literature which interrogates the Tribunal's sociological legitimacy with reference to a variety of stakeholders (s.4.3), primarily, the people in the region (s.4.3.2) and particularly in relation to victims of the crimes being punished (s.4.3.1). Alongside this, the chapter explores the normative (legal and moral) legitimacy dimension of punishment dispensed by the ICTY (s.4.4). Through the findings' chapters (Chapters 5, 6, 7 and 8), this thesis argues that UER is a continuation of many of these legitimacy challenges and deficits identified in this literature. This chapter also explores the significant, albeit more limited, scholarly critiques of the normative legitimacy dimension of the Tribunal's Presidents' decision-making and early release explicitly (s.4.5). As this thesis complements and extends this area of research, it is detailed further in Chapters 5 and 6.[3] Finally, this chapter notes a small body of literature which has raised disquiet at the return of those convicted by the ICTY to the region, and the challenge to ICTY's sociological legitimacy as they do so. Other literature addressing these homecomings is noted in the relevant Chapters (6 and 7) outlining the impact of UER on post-conflict BiH

Prior to examining these accounts of the legitimacy of the Tribunal's exercise of power, it is important to acknowledge the specific nature of the Tribunal itself and its establishment (s.4.2). Its

[1] The word observers is used as the literature exploring the Tribunal's legitimacy, published in academic journal is not only written by academics, but also by practitioners (judges and prosecutors from the Tribunal itself) and staff members.
[2] See Chapter 2, s.2.2
[3] B. Holá called for the exploration of the impact of UER on reconciliation in BiH, see B. Holá, J. van Wijk, F. Constantini, and A. Korhonnen, 'Does Remorse Count? ICTY Convicts' Reflections on Their Crimes in Early Release Decisions' (2018) *International Criminal Justice Review* 28(4): 349-371 at 366. Given time and resources the empirical research for this thesis was undertaken to capture and analyze a select number of stakeholders' perceptions of the legitimacy of UER, in addition to exploring its normative legitimacy. Further, it would be counter-intuitive to measure UER's impact on reconciliation when reconciliation itself is such a contested concept and much of the scholarship on post-conflict BiH argues that reconciliation is limited in BiH, see s.4.3.2.

genesis and characteristics have, as argued in the literature[4] and reflected in this thesis' findings, influenced the operationalisation of the Tribunal's penal practice and its relationship with its stakeholders. Alongside this, the Tribunal's unique nature (s.4.2) has also played a role in determining how the Tribunal is perceived in the region (its overall sociological legitimacy). Additionally, by detailing these characteristics of the ICTY, the thesis highlights a number of characteristics shared by other International Criminal Tribunals (ICTs) and the permanent International Criminal Court (ICC). First, they have multiple, sometimes conflicting, stakeholders, with differing priorities and understandings of the Tribunal/Court's purposive legitimacy.[5] Second, they are removed from the society over which they have jurisdiction. Third, the nature and gravity of the crimes they adjudicate "explode the limits of law".[6] Thus, some findings on the legitimacy challenges raised by UER are generalisable. Therefore, other ICTs and the ICC could draw lessons from these findings as they consider the grant of early release for perpetrators of atrocity crimes and undertake practices assist in maintaining their overall legitimacy through good performance legitimacy.[7]

4.2. The Establishment and Nature of the Tribunal

4.2.1. The Tribunal's Multiplicity of Stakeholders and their Perceptions of its Purposive Legitimacy

The ICTY was established as the war in the FRY was raging.[8] As the UN Security Council established the Tribunal it set out its determination to "*bring an end* to [widespread violations of international humanitarian law ... including mass killings and … ethnic cleansing] and to take effective measures to *bring to justice* the persons … responsible for them".[9] The ICTY's core mandates,[10] its purposive legitimacy,[11] in the minds of the UNSC were twofold. First, specific deterrence, as it determined the ICTY would assist in ending the killing; second, accountability as it would bring to justice those responsible. Member States of the UNSC were key stakeholders of the Tribunal, given they were its founders who provided resources, and annually extended its mandate after they scrutinised the

[4] K. King and J. Meernik, 'Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia: Balancing International and Local Interests While Doing Justice' in B. Swart, A. Zahar and G. Sluiter (eds.) *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press, 2011) 7-54.
[5] P.J. Keenan, 'The Problem of Purpose in International Criminal Law' (2016) *Michigan Journal of International Law* 37(3): 421-474 at 454
[6] H. Arendt cited in M. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, 2007) and G. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press, 2000) noting that H. Arendt, in relation to the Nuremberg Trials, argued that sentencing someone for the destruction of thousands of lives is "totally inadequate" at 13.
[7] See Chapter 3. 3.4.3, "Performance Legitimacy" is also described as 'Legitimacy of Exercise' and "Process Legitimacy"
[8] The ICTY was established by the UN Security Council (UNSC) under Chapter VII of the UN Charter on 22 February 1993.
[9] UNSCR 808, 22 February 1993 – emphasis added.
[10] See Chapter 8, s.8.5, which a number of Tribunal judges were keen to emphasis.
[11] See Chapter 3, s.3.4.2.

Tribunal's Annual Reports – which outlined its exercise of power. Other stakeholders of the Tribunal were identified by the UN appointed Commission of Inquiry, which documented a number of the violations of international humanitarian law, on which the Tribunal adjudicated.[12] The Commission's final report noted the "high expectation of justice conveyed by the parties to the conflict, as well as by victims, intergovernmental organizations, and non-governmental organizations, the media and world public opinion."[13] The report immediately asserted that "the International Tribunal must be given the necessary resources and support to meet these expectations and accomplish its task".[14] The Commission appeared to caution one group of stakeholders, UNSC Member States (to whom the report was presented and who financed the Tribunal), to pay heed to the Tribunal's other stakeholders, which included the victims. Glasius and Colona noted this multiplicity of stakeholders who, immediately on the Tribunal's establishment, had "diverse founding expectations".[15] The second group of international stakeholders identified (INGOs, NGOs, the international media, and victims) were described by the Commission as having "high expectation[s]".[16] Their conception of justice was wider than incapacitation of perpetrators, accountability, and a cessation of hostilities. Schrag described these purposes as, amongst others, bringing "a sense of justice to war-torn places".[17] For these outside stakeholders (including victims of the conflict), Schrag suggested theirs was a broad reading of the wording of the UNSCR which asserted that the Tribunal would "contribute to restoration and maintenance of peace".[18] The maintenance of peace could entail a long-term mandate. Yet a strict reading of the phrase, "the restoration and maintenance of peace" could implicitly make the life of the *ad hoc* Tribunal time-bound. Technically, after it had tried those responsible for the mass violations, and when peace was restored, the Tribunal had achieved its purposes. Thus, for one set of stakeholders, on whose finances it depended for its existence and operationalisation,[19] the Tribunal had a limited timeframe: the Tribunal was established with the immediate aim of incapacitating the warring parties and ending the ongoing conflict in FRY.[20] Finally, the Bassiouni report indirectly identifies an antagonistic set of stakeholders, Serbian public

[12] Chairman of the United Nations Commission of Experts Established Pursuant to Security Council 780 (1992) to Investigate Violations of International Humanitarian Law in the Former Yugoslavia (1993-94).
[13] Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), para. 320
[14] Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), para. 320 – emphasis added - cited in M. Glasius and F. Colona, 'The Yugoslavia Tribunal: The Moving Targets of a Legal Theatre' in D. Abazović and M. Velikonja (eds.) *Post-Yugoslavia: New Cultural and Political Perspectives* (Palgrave Macmillan, 2014) at 12.
[15] M. Glasius and F. Colona, 'The Yugoslavia Tribunal: The Moving Targets of a Legal Theatre' in D. Abazović, M. Velikonja (eds.) *Post-Yugoslavia: New Cultural and Political Perspectives* (Palgrave Macmillan, 2014) at 11. *Hereinafter*, M. Glasius and F. Colona, 'The Yugoslavia Tribunal: The Moving Targets of a Legal Theatre'.
[16] Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), para. 320.
[17] M. Schrag, 'Lessons Learned from ICTY Experience' (2004) *Journal of International Criminal Justice* 2: 427-434, at 428.
[18] UNSCR 808, 22 February 1993
[19] M. Klarin, 'The Tribunal's Four Battles' (2004) *Journal of International Criminal Justice* 2(2): 546–55 at 552
[20] R. Kerr, 'Peace through Justice: The International Criminal Tribunal for the Former Yugoslavia' (2007) *Southeast European and Black Sea Studies* 7(3): 373-385 at 380.

opinion.[21] This set of stakeholders had been rallied by "regional media bias as well as the early framing of the Tribunal in the international media [which had] emphasised the 'Serb crimes' being prosecuted. Therefore, from the outset, dominant Serbian public opinion [was] against the proposed court".[22] Thus, the purposive legitimacy of the Tribunal was conceived of, and its exercise of power observed in the light of this conception, differently by its numerous audiences,[23] whether it realised this or not.

4.2.2. The Tribunal: A Giant with No Arms and No Legs

In addition to having multiple stakeholders with differing expectations, these stakeholders had differing levels of influence, at different times, and for different purposes. One set of stakeholders (Members of the UNSC) were directly influential, given the *ad hoc nature* of the Tribunal. In May 1993 the Tribunal did not physically exist; money had to be obtained to build it and staff it. Further, it was no easy task, as there was a lack of effort by "major western powers to deliver … a working budget".[24] A number of scholars have argued that this led the Tribunal to focus its initial "efforts to gain legitimacy"[25] on the international community[26] rather than the region, which led them to overlook stakeholders in the region[27] (albeit with a view to bringing accused perpetrators in the region to justice). This argument, that the Tribunal's initial efforts to obtain legitimacy were focused not on the region but on the more nebulous international community of states, is implicitly supported when one looks at its first Annual Report. It dedicates 22 paragraphs outlining the "Tribunal and World Public Opinion" in contrast to one and a half paragraphs to the "Public

[21] Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992). "The Commission is shocked by the high level of victimization and the manner in which these crimes were committed, as are the populations of all the parties to the conflict. The difference is that each side sees only its own victimization, and not what their side has done to others" at para. 317.

[22] M. Glasius and F. Colona, 'The Yugoslavia Tribunal: The Moving Targets of a Legal Theatre' in D. Abazović and M. Velikonja (eds.) *Post-Yugoslavia: New Cultural and Political Perspectives* (Palgrave Macmillan, 2014) at 12 referencing D. Cotič, "Introduction' in R. Clark and M. Sann (eds.) *The Prosecution of International Crimes* (Transaction Publishers, 1996) at 10-12.

[23] See Chapter 3.4.3. See specifically, 'Audience and Performance', 160-173 in K. McEvoy and A. Schwartz, 'Judging and Conflict: Audience, Performance and the Judicial Past' in A.M. McAlinden and C. Dwyer (eds.) *Criminal Justice in Transition: The Northern Ireland Context* (Bloomsbury, 2015) 157-184.

[24] M. Glasius and F. Colona, 'The Yugoslavia Tribunal: The Moving Targets of a Legal Theatre' at 13.

[25] J. Subotić, 'Legitimacy, Scope and Conflicting Claims on the ICTY: In the Aftermath of Gotovina, Haradinaj and Perišić' (2014) *Journal of Human Rights* 13: 170-185, at 179.

[26] M. Klarin, 'The Tribunal's Battles' (2004) *Journal of International Criminal Justice* 2(2): 546–558 at 552.

[27] M. Klarin, 'The Tribunal's Four Battles' - "The Tribunal was initially busy with winning over the 'hearts and minds' of those on whom its survival and functioning depended – such as the UN Budgetary Committee, other donors to NATO, as well as those who were in a position to ensure the arrests of the accused and access to witnesses and evidence. Thus, in the first few years, the Tribunal had almost totally neglected its 'constituency', as Judge Gabrielle Kirk-McDonald once described the public in the countries of the former Yugoslavia' (2004) *Journal of International Criminal Justice* 2: 547-558 at 552.

Relations" in the region.[28] To what extent, this thesis queried, was a focus maintained on the international community over that of the region, and did this focus play a role in the practice in UER?

This financial reliance on states continued beyond the lifetime of the Tribunal at the enforcement of sentences stage. Upon conviction, the Statute directed that perpetrators' sentences were enforced in states other than the FRY, which required these states' agreement.[29] Thus, *prima facie*, the Tribunal was reliant on these states' goodwill to enforce their sentences.[30] Consequently, its perceived legitimacy by these stakeholders was required. An attitude towards the significance of these stakeholders' assessment of their legitimacy was noted by the former Tribunal's Chief Prosecutor Arbour, who asserted that the Tribunal "perceived itself … very much at the mercy of state co-operation, very uncertain about its financial future … [and] about the political support in world public opinion".[31] Arbour's assertion raised the question as to whether this self-perception of dependency upon enforcement states by inside stakeholders continued when considering UER, as a pardon or commutation of sentence (effectively UER) was triggered, under the Statute, on the penal law of the enforcement state.[32]

The positivist legalistic approach to obtaining and maintaining legitimacy, was well articulated by Damaška, "lacking coercive [power], their legitimacy hangs almost entirely on the quality of their decisions and their procedures."[33] A number of Tribunal judges also held this legalistic approach although not all observers shared this attitude on how best the Tribunal could maintain its legitimacy (detailed below s. 4.2.3).

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[28] ICTY Annual Report 1995, paras 161-184. These paragraphs reported on the positive coverage from the New York Times, Le Monde and newspapers in the Netherlands. This visible pattern, of one stakeholder being briefly referenced then immediately overshadowed by another, speaks to the literature, which critiqued the Tribunal's initial rhetoric, which asserted it was bringing justice. The argument is that it was not that the Tribunal deliberately neglected stakeholders in the region, but made assumptions as to what it was they wished for (see s.4.3.1).

[29] Bilateral agreements between the ICTY and European States: see: https://www.icty.org/en/documents/member-states-cooperation [accessed 09/12/2019]

[30] R. Mulgrew, *Towards the Development of the International Penal System* (Cambridge University Press, 2014) at 23.

[31] M. Klarin, 'The Tribunal's Four Battles' (2004) *Journal of International Criminal Justice* 2: 550-551 at 546.

[32] Article 28, ICTY – see Chapter 5, s. 5.2.

[33] M. Damaška, 'What is the Point of International Criminal Justice' (2008) *Chicago-Kent Law Review* 83(1) 329-365 at 329 noting that "interdisciplinary literature on norm acceptance through persuasion suggests that there is a necessary condition for their success in performing this socio-pedagogical role: they should be perceived by their constituencies as a legitimate authority" at 345 referencing T. Tyler, *Why People Obey the Law* (Yale University Press, 1990) and G.R. Miller, '*On Being Persuaded*: Some Basic Distinctions', in J. Price Dillard and M. Pfau (eds.) *The Persuasion Handbook: Developments in Theory and Practice* 4-5 (Sage, 2002).

4.2.3. The Tribunal Judges Defining their Role

The Tribunal's second challenge was that International Criminal Law (ICL) was in its infancy. The judges had little established precedent to guide their decision-making, not only on determining guilt or innocence, but whether certain criminal law defences, such as duress, were applicable under ICL.[34] This meant, in effect, they were often developing ICL.[35] As noted by the Tribunal's first President, among the problems for international criminal courts, and particularly for the ICTY, was that its judges had to "apply, in addition to its Statute, customary international law, which can only be ascertained by consulting widely-dispersed international law sources".[36] President Cassese implicitly recognised, by use of the word "ascertained" that, unlike national jurisdictions, which, he reflected, could "rely on dozens of codes and hundreds of precedents for guidance",[37] Tribunal judges were searching for practice, and in doing so developing international customary law into a body of ICL. This role is articulated as a matter of pride by some judges themselves. President Meron noted that the ICTs (the ICTY and its sister Tribunal the ICTR) had "helped create a whole new universe of international criminal justice in which an end to impunity and legal accountability … are … increasingly our reality".[38] Similarly, Judge Wald describes the "ICTY's premier accomplishment … [as] … the development of a *corpus justis* of international humanitarian law".[39] The judges' self-perception has led some authors to propose that developing ICL became the main focus of the Tribunal.[40] For many legal scholars this aspect of the Tribunal's work is perceived as its major contribution to international criminal justice.[41] Yet, the success of developing ICL was time consuming, and led to re-trials,[42] and frequently delayed justice for stakeholders in the region. This has been emphasised by observers who have focused their attention on the societal role of law, and critiqued the Tribunal judges for not doing so, thereby neglecting stakeholders' perceptions of them

[34] A. Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) *European Journal of International Law* 9: 2-17 at 11, citing Erdemović's defence.
[35] K.I. Kappos and P.W. Hayden 'Current Developments at the Ad Hoc International Criminal Tribunals' (2016) *Journal of International Criminal Justice* 14: 1261-1295.
[36] A. Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' at 11.
[37] A. Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' at 11.
[38] T. Meron, 'The Making of International Criminal Justice: The View from the Bench: Selected Speeches (Oxford University Press, 2012) at 109.
[39] P. Wald 'ICTY Judicial Proceedings: An Appraisal from Within' (2004) *Journal of International Criminal Justice* 2(2): 466-473 at 472.
[40] D. Orentlicher, Shrinking the Space, at 53 cited in J K. King and J. Meernik, 'Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia: Balancing International and Local Interests While Doing Justice' in B. Swart, A. Zahar and G. Sluiter (eds.) T*he Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press, 2011) 7-54, citing President Pocar at 13.
[41] R. Kerr, 'Peace through Justice: The International Criminal Tribunal for the Former Yugoslavia' (2007) *Southeast European and Black Sea Studies* 7(3): 373-385 at 383.
[42] Erdemović retrial.

in the region.[43] This critique was harshly noted by an ICTY former spokesperson that "the Tribunal's judges have been and will always be more interested in what international law journals have to say about their judgments than the people to whose lasting peace they are supposed to be contributing".[44] An exploration of this attitude, of proud developers of ICL, was called for as the President and his colleagues developed the penal practice of UER. The second and third sub-research question addressed this, as they examined how the judges reasoned and perceived UER; to what extent was the practice a well-reasoned one and what were their perceptions of the practice?

The self-perception expressed above - judges as legalists tasked with deciding on, and where necessary, developing ICL - was made clear by some judges who asserted that they did not perceive their role as contributing to peace. This position was captured clearly by Tribunal President Pocar (2005– 2009) as he noted that "the ICTY was entrusted with prosecuting and holding trials for the main perpetrators … and that's the only task".[45] What is evident here is how divergent the perceptions of the Tribunal's purposive legitimacy[46] were, even among internal stakeholders (the judges and staff of the Tribunal). Hodžić perceived the Tribunal's core purpose as being the second half of the Tribunal's mandate, its contribution to the restoration and maintenance of peace; whereas President Pocar perceived its sole purpose as fulfilling the first half of the mandate – bringing to justice those responsible for grave crimes.[47]

The criticism of judges being focused on their role in ascertaining the law, arising from reality that ICL was in its infancy, may never have arisen if, from the outset, they had made clear that determining the guilt or innocence of the accused was their focus. Yet this was not the case, as some of the judges themselves espoused these broader non-legal goals to their work, such as peace in the region. Critiques that the Tribunal neglected regional stakeholders are valid because, as s.4.3.1 outlines, upon reading the initial ICTY judgments (written by judges rather than other organs of the Tribunal) they asserted that their judgments would have positive societal benefits, often citing reconciliation[48] - goals, which are "far removed from the normal concerns of national criminal

[43] R. Hodžić's critique and Dimiitrijević cited in M. Klarin, 'Impact of the ICTY Trials on Public Opinion in the Former of Yugoslavia' (2009) *Journal of International Criminal Justice* 7: 89-96 at 96 and M. Schrag, 'Lessons Learned from ICTY Experience' (2004) *Journal of International Criminal Justice* 2: 427-434 at 431.
[44] See: https://balkaninsight.com/2013/03/06/accepting-a-difficult-truth-icty-is-not-our-court/ [15/11/2019]
[45] D. Orentlicher, *Shrinking the Space for Denial: The Impact of the ICTY in Serbia* (Open Society Institute, 2008) at 53 referencing Presidents Pocar and Meron cited in K. King and J. Meernik 'Assessing the Impact' in B. Swart, A. Zahar and G. Sluiter (eds.) T*he Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press, 2011) at 13.
[46] See Chapter 3, s.3.4.2.
[47] Wording of the UNSCR 808, 22 February 1993.
[48] *Prosecutor v. Erdemović*, Judgement 29 November 1996, para. 58; *Prosecutor v. Delalić et al*., 16 November 1998, para. 1203; *Prosecutor v. Furundžija*, 10 December 1998, para. 288, *Prosecutor v. Todorović*, 31 July 2001, para. 91, *Prosecutor*

justice".[49] This criticism was directly argued by Subotić who asserted that: "the ICTY has in no small part brought this unrealistic expectation [of being the "principal instrument of both retributive and restorative justice"] onto itself by legitimizing its work to hostile domestic publics as a path to reconciliation and creation of a historical transcript".[50]

As the practice of UER was a new development in ICL (detailed s.4.5 and Chapter 5), this divergence of perceived purposes, the reality of the judges being responsible for developing ICL and practice, and the accusation that this was done at the expense of the region, were probed in this thesis' research in relation to UER. To what extent did the judges at the Tribunal focus their attention on developing the practice of early release and to what extent did they consider this penal practice as being significant for the region? This thesis contributes, through its direct engagement with the Tribunal's internal stakeholders in The Hague (which ascertained their self-perception), to advancing knowledge beyond the trial process to that of the enforcement of criminal justice – that is, the practice of, and reasons for, the premature ending of the enforcement of justice: UER from imprisonment.

4.3. The Tribunal's Legitimacy of Practice with Key Stakeholders

The above section (s.4.2.1) outlined the pragmatic challenges caused by the unique *ad hoc* nature of the Tribunal, which scholars have argued influenced how it engaged with its key stakeholders – that is, its performance legitimacy. In addition to this practical challenge was the "self-imposed … overabundance of … goals" was the fact that they not only were "truly gargantuan"[51] but not accorded enough priority (s.4.3.2) which led to sociological legitimacy deficits. During the course of its lifetime (at least since 1999 when it established Outreach) the ICTY actively sought to be perceived as legitimate by its regional stakeholders (the post-war communities of the FRY) as well as the UNSC Member States who funded their work.[52] It sought to gain and maintain legitimacy as it issued Press Releases regarding its work, translated court documents into the local languages,

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v. Mrđa, 31 March 2002, and *Prosecutor v. P. Banović*, 28 October 2003, para. 66, 67 and 70. President Cassese's rhetoric of reconciliation was noted by D. Amann as being "somewhat breath-taking", D. Amann 'Message as Medium in Sierra Leone' (2000) *ILSA Journal of International and Comparative Law* 7: 175 referenced by M. Glasius and F. Colona, 'The Yugoslavia Tribunal: The Moving Targets of a Legal Theatre' in D. Abazović, M. Velikonja (eds.) *Post-Yugoslavia* (Palgrave Macmillan, 2014) at 26

[49] M. Damaška, 'What is the Point of International Criminal Justice' (2008) *Chicago-Kent Law Review* 83(1) 329-365 at 331.

[50] J. Subotić, 'Legitimacy, Scope and Conflicting Claims of the ICTY: in the Aftermath of Gotovina, Haradinaj and Perisic' (2006) *Journal of Human Rights* 13: 170-185 at 172.

[51] M. Damaška, 'What is the Point of International Criminal Justice' at 331.

[52] In 2000 the AR noted that: "an Outreach Programme was established to improve understanding of the work of the Tribunal and its relevance in the territory of the former Yugoslavia … aims to enhance comprehension of the Tribunal's mandate and performance and to counter misperceptions and inaccurate information being circulated" at paras. 213-214.

summarised judgments for public consumption, broadcast trials live in the region, opened offices in the region, and held legacy conferences.[53] Through this active engagement with the public in the region, the Tribunal was implying that their perceptions mattered. The ICTY, therefore, had established post-conflict society in the FRY as stakeholders in their dispensation of justice by actively disseminating and explaining their decisions (legitimation through justification and participation)[54] to them. This research questioned the extent to which this engagement extended to UER as perpetrators returned to post-conflict society; for example, were early release decisions made public, explanatory press releases made and were the decisions explained?

4.3.1. Rhetoric and Reality for Victims

It is worth reiterating here[55] why the Tribunal's engagement (or lack thereof) with victims in particular is relevant in an assessment of its legitimacy for the purposes of this thesis, given that the mandate of the Tribunal was clearly to "bring to justice"[56] perpetrators of atrocity crimes and deter others. There are two reasons: the first is purposive and the second functional.[57] Scholarship has examined the Tribunal's engagement with them from these two perspectives.

Victims are purposively legitimate stakeholders in the ICTY's dispensation of criminal justice, because the Tribunal itself (organs from the President, the judges, the Prosecutor and Public Relations) outwardly signalled that providing justice to victims was one of its objectives. In explaining its "establishment" and under its list of "achievements" on the website, it asserted that "by holding individuals responsible for crimes committed in the former Yugoslavia, the Tribunal is bringing justice to victims".[58] The rhetoric began at the outset of the Tribunal and was on-going, and it requested assistance from the UNSC in order to "complete the mandate given … to combat impunity and *render justice to the victims* of war crimes and crimes against humanity".[59]

Scholars have argued that some of the Tribunal's rhetorical aspirations erred, as they presumed these were aspirations shared by a key stakeholder, the victims, and in assuming this convergence "silenced them".[60] In addition to the literature, the presumptiveness of some of the Tribunal's

[53] See: https://www.icty.org/en/outreach/home [accessed 04/12/2019].
[54] See Chapter 3, s.3.5.5 and s.3.5.6.
[55] See Chapter 3, s.3.6.3 for victims as stakeholders in the criminal justice system more broadly.
[56] UNSCR 808, 22 February 1993.
[57] L. Moffet, *Justice for Victims Before the International Criminal Court* (Routledge, 2014) at 39.
[58] See: http://www.icty.org/en/about/tribunal/achievements [accessed 19 May 2019].
[59] ICTY Annual Report 2002, para. 321 – emphasis added.
[60] N. Patterson, 'Silencing Victims in International Courts: Neglecting a Solemn Obligation' (2003) *Georgetown Journal of International Affairs* 4(1): 95-100.

internal stakeholders is implicit in the ICTY's first Annual Report. It noted that bringing justice to perpetrators would "be a means, at least in part, of alleviating [victims'] suffering and anguish".[61] Prosecutors similarly have justified their strategies in the name of victims. Chief Prosecutor Carla de Ponte[62] justified her strategy of pursuing direct perpetrators of particularly heinous crimes as well as the high-level political and military leaders for the sake of the victims. She asserted to the UNSC that, "for the victims and survivors ... it was these people who brought their world to an end … Unless these local leaders are brought to justice … the ordinary population will not come to terms with the past".[63] Both of these statements further hint that the role of the victims was perceived as passive:[64] justice was being brought to them, and for them, and the Tribunal believed that, in doing so, it would alleviate them from their position of powerlessness; their world, according to the Prosecutor, had been devastated. The Tribunal pledged itself to fulfil the ambitious mandate that some of its state supporters had hoped for, such as the Hungarian Ambassador to the UN. He had declared his belief (and that of his country) that a successful criminal tribunal could make it "easier [for] the healing of psychological wounds that the conflict has inflicted on the peoples"[65] of the former Yugoslavia. Fletcher, Stover and Weinstein consider this language, and note that the notion of "healing of psychological wounds" is linked to broader societal peace, and assert that, from its inception, "the goal of reconciliation became associated with these trials for many supporters"[66] of the Tribunal. Alongside this the President espoused that the Tribunal would be a "tool to promote reconciliation and restore true peace".[67] The same Annual Report implicitly exposed the problematic dynamic with this notion of the Tribunal being a tool for promoting reconciliation.[68] This was the assumption that punishing individual perpetrators would bring satisfaction to victims, and providing retributive justice would quell the desire for revenge.[69]

Victims, functionally, are key stakeholders in the dispensation of justice,[70] alongside the purposive rhetoric. They were essential to the work of the Tribunal. Victims were required to testify to their victimhood (either as direct victims or as eye-witnesses to the crimes) to bring perpetrators to

[61] ICTY Annual Report 1994, para. 51
[62] ICTY Chief Prosecutor 1999 - 2007.
[63] Carla de Ponte's Report to the UNSC, 27 November 2001.
[64] Review of articles by L. Fletcher, K. McEvoy, A.M Dembour and E. Halsam, C. Jorda and J. de Hamptine, which discuss silencing victims in the trial process, also discussed in Stover's book on victims who directly engaged with the Tribunal, see E. Stover, *The Witnesses* (University of Pennsylvania Press, 2005).
[65] E. Stover and H. Weinstein, *My Neighbour My Enemy*: *Justice and Community in the Aftermath of Mass Atrocity* (Cambridge University Press, 2004) at 36.
[66] E. Stover and H. Weinstein, *My Neighbour My Enemy: Justice and Community in the Aftermath of Mass Atrocity* at 36-37.
[67] ICTY Annual Report 1994, para. 16.
[68] ICTY Annual Report 1994, para. 16
[69] ICTY Annual Report 1994, para. 15.
[70] See Chapter 3, s.3.6.3. See N. Christie, 'Conflicts as Property' (1977) *The British Journal of Criminology* 17(1): 3.

justice. As acknowledged by the Tribunal, "many of the first available witnesses were victims who had fled from Bosnia and Herzegovina [who] had been held in detention camps and had been the subject of "ethnic cleansing".[71] The victims' role under the Statute was as functional witnesses.[72] This role became a status entrenched by the judges, as they adopted the Tribunal's Rules and Procedure of Evidence, in which victims generally were referenced in the single phrase of "victims and witnesses".[73] In the Statute, the first mention of victims' role is that the prosecutor has the right to question victims in gathering evidence for indictments.[74] Article 20 provides that trials "are conducted … with full respect for the rights of the accused and due regard for the protection of victims and witnesses". The article provides that the rights of the accused are balanced against the "due regard" for victims' and witnesses' safety; for example, having their identity protected and being allowed to give testimony in camera rather than open court.[75] This language emphasises the victims' role as being that of providers of evidence, whose protection was required as a commodity of testimony. Their interests are borne in mind, but they are passive, in contrast to the defendants who can assert rights. The Statute directs that they are given due regard to their safety.[76] This has led some, including former ICTY President Jorda, to conclude that the procedures followed by the Tribunal "reduce[d] the victim to nothing more than the 'object-matter' of international criminal proceedings".[77] Jorda and de Hemptine urged the Intentional Criminal Court to allow for a greater, different role for victims than just victim-witnesses. They recommended criminal proceedings to be split in two, and, for the second part, to provide victims with an opportunity to be heard, under "inquisitorial rules and subject to strict control by the judge", thereby enabling victims to "speak of their personal sufferings".[78] If there had been a separate occasion for victims to present victim impact statements, this may have enabled the judges to frame their thinking accordingly, and focus on the personal loss of the victim, rather than simply listen for whether or not their testimony corroborated the prosecution's case. This has been argued by Tribunal prosecutors as well as

[71] See: http://www.icty.org/en/about/office-of-the-prosecutor/history [accessed 23 March 2019].
[72] One instance which refers to victims in the broader sense effectively removes the possibility of the Tribunal in providing any reparative justice for victims, as it determined that the Tribunal's work "shall be carried out without prejudice to the right of the victims to seek … compensation for damages incurred as a result of violations of international humanitarian law", UNSCR 827 (1993) 25 May 1993, para. 7.
[73] In 17 of the 21 references to Victims, they are noted as 'Victims and Witnesses'. Victims are discussed independently in relation to compensation for victims (Rule 106), consideration of victims in relation to the amendment of the accused indictments being amended by the Prosecutor (Rule 73 bis); the other note relating to victims, is in the context of victim-witnesses providing evidence in written rather than oral testimony.
[74] Article 18 ICTY Statute.
[75] Article 22 ICTY Statute.
[76] Article 22 ICTY Statute.
[77] C. Jorda and J. de Hemptine, 'The Status and Role of the Victim' in A. Cassese, P. Gaeta, J.R.W.D. Jones (eds.) *The Rome Statute of the International Criminal Court, Volume II* (Oxford University Press, 2003) 1387-1419 at 1389.
[78] C. Jorda and J. de Hemptine, 'The Status and Role of the Victim' at 1417.

scholars [79] who have asserted that "giving more voice to the victims … can also help the judges to better understand the elements of the crimes that they are considering".[80] This thesis questioned whether this principle could have similarly been applied when the President and his colleagues considered an application for pardon or commutation of sentence? As noted in Chapter 3, s.3.6.3, in a number of countries, victims have the right to be informed when their perpetrators are being considered for release from imprisonment and to make statements to parole boards as to the impact this may have on them.[81] The interviews, therefore, asked: did the judges' perceive the victims as having any role to play at this stage, whereby the perpetrator was released back into their lives? To what extent did the judges consider victims as they decided on perpetrators' UER?

The Tribunal's legitimacy of exercise has been critiqued by observers[82] who have argued that its exercise of power "reduced [victims] to instrumentalized witnesses".[83] It was not, however, only the prosecution who lacked sensitivity, but, at times, judges also. Dembour and Haslam pointed to numerous instances in the Krstić transcripts where judges steered witnesses away from recounting their feelings towards the details they deemed relevant.[84] It was not the place for victims to tell of their personal sufferings. This was also supported by Stover's empirical research, whereby judges will "admonish witnesses who stray from the facts, which can frustrate victims who have waited years to tell their story".[85] Of more concern in their findings were occasions where judges simply failed to hear victims, and consequently made "incongruously optimistic" remarks.[86] In one instance, the presiding judge thanked a witness who had testified to his father being disappeared, and most likely dead, and noted "I hope your father will come back".[87] These remarks, whereby judges appeared oblivious to victims, reiterated the importance of probing judges' actions in determining UER; to what extent did they consider victims when they made their decisions?

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[79] M. Damaška, 'What is the Point of International Criminal Justice?' at 334.
[80] N. Patterson, 'Silencing Victims in International Courts: Neglecting a Solemn Obligation' (2003) *Georgetown Journal of International Affairs* 4(1): 95-100*:* at 99.
[81] A. Ashworth, 'Victim Impact Statements and Sentencing' (1993) *Criminal Law Review* 1: 498–509. See Chapter 3, s.3.6.3.
[82] N. Patterson, 'Silencing Victims in International Courts: Neglecting a Solemn Obligation' who begins her article by recalling a witness in the Milosevic trial who was disappointed with the judges as they excused him from the witness stand. He 'protested' he was not asked 'what [he] went through at the Izbica massacre'.
[83] C. Jorda, 'The Major Hurdles and Accomplishments of the ICTY What the ICC Can Learn from Them' (2004) *Journal of International Criminal Justice* 2: 572-584 at 578.
[84] M.B Dembour and E. Haslam, 'Silencing Hearings? Victim-Witnesses at War Crimes Trials' (2004) *European Journal of International Law* 15(1): 151-177, at 160.
[85] E. Stover, *The Witnesses*: *War Crimes and the Promise of Justice in The Hague* (University of Pennsylvania Press, 2005) at 129.
[86] M.B Dembour and E. Haslam, 'Silencing Hearings? Victim-Witnesses at War Crimes Trials' at 173.
[87] M.B Dembour and E. Haslam, 'Silencing Hearings? Victim-Witnesses at War Crimes Trials' at 173.

Stover studied victims and their lived experiences of testifying. His empirical study of 87 victim-witnesses found that 77% of those who testified found the experience of testifying at the Tribunal a positive one, not for any sense of catharsis, but primarily due to the "professionalism of staff" with whom they engaged.[88] This professionalism encompassed practices such as taking them into the courtroom prior to testifying, debriefing them, and "most important, contacting them once they had returned home".[89] Stover's findings have being recently supported by Meernik and King, who found in their quantitative study that the majority of witnesses (78%) were largely satisfied with their experience with the ICTY.[90] This finding supports Tyler's theory of "procedural justice",[91] which argues that how an institution of authority treats its participants is the most significant factor in how the participants perceive an institution's overall legitimacy.[92] Stover's finding pointing to the significance of the "quality of interpersonal treatment" is reflected also through what the witnesses found as negative factors. These included victim-witnesses' frustration and disappointment at not being informed of the reasons for subsequent acquittals. The value of procedural justice was implicitly recognised by Jorda and de Hemptine who expressed regret that a victim had no right "to be kept informed of the course taken by the proceedings even where they are of personal concern to him".[93] These studies highlight the legitimacy challenges the Tribunal faced in relation to treatment of victims who had testified before it. Both studies' authors made recommendations for better procedural justice, to enhance the Tribunal's legitimacy of exercise in relation to the victims with whom it directly engaged. Provision of updated information, as a positive in shaping victim perceptions of the Tribunal's legitimacy, is pertinent to UER of perpetrators. As the following chapter details, the Practice Direction guiding the President on the practicalities of early release provided the possibility of informing those who testified before the Tribunal, including, therefore, victim-witnesses, of a grant of early release.[94] The extent to which victims were informed, and reactions to this, were posed in the questions to interviewees, both at the Tribunal and those in BiH.

Empirical studies have researched the broader community of victims (only a handful of victims appear before the Tribunal). Clark has critiqued the Tribunal for failure to see justice for victims as anything beyond retributive justice, and, therefore, failing to consider measures to assist their

[88] E. Stover, *The Witnesses*: *War Crimes and the Promise of Justice in The Hague* (University of Pennsylvania Press, 2005) 90-91. (Hereinafter, E. Stover, *The Witnesses*).
[89] E. Stover, *The Witnesses,* at 96.
[90] K.L. King and J. Meernik, 'The Witness Experience: Testimony at the ICTY and its Impact' (Cambridge University Press, 2017) – noted in Book Review by Subotić (September 2018) *International Relations* 16(3).
[91] See Chapter 3, s.3.5.3.
[92] T. Tyler, *Why People Obey the* Law (Yale University Press, 1990).
[93] C. Jorda and J. de Hemptine, 'The Status and Role of the Victim' at 1391.
[94] Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence and Early Release of Persons Convicted by the International Tribunal, 1 September 1999, para. 11.

interests.[95] The Tribunal was, after all, routinely asserting that its "beneficiaries [were] victims of the conflict"[96] – not only those who testified before them as witnesses. Clark's assertion supports Fletcher, who has similarly asserted that the Tribunal has formulated an "imagined victim which supports the logics of international criminal justice, which ... render … invisible the particular meanings and desires [of justice] of real victims".[97]

Clark's empirical findings did not "support the Tribunal's claim that it is delivering justice to victims".[98] Clark's interview data demonstrate that the Tribunal did not have a clear strategy of how to actually achieve justice for victims, and she argued that the Tribunal should have recognised the limits of legal justice from the outset. Others too have recognised a generalisable failing of transitional justice mechanisms to live up to victims' justice rhetoric. McEvoy and McConnachie have argued that it is unfair to raise victims' expectations through rhetoric, only to fall short through practice. They have called for a "greater degree of humility".[99] Their assertion has been that numerous transitional justice mechanisms (including ICTs) and their "entrepreneurs" are "irresponsible to promise … victims that they will have their voices heard or, even more grandiosely, that these processes can … deliver justice … or lead to healing and reconciliation".[100] This was the initial rhetoric adopted by the ICTY in early Annual Reports[101] and judgments.[102] This justice rhetoric was proudly expressed at the outset of the Tribunal's lifetime, though later "toned down".[103] However, as the findings chapters discuss, once expectations were raised they were, as noted by the Commission of Experts Final Report,[104] expected to be fulfilled. When they were not it had the potential to lead to disappointment. Not only victims but scholars and prosecutors also perceived that there was a duty to victims, and perceived the Tribunal's treatment of them as "neglecting a

[95] J.N. Clark, Judging the ICTY: Has it achieved its objectives?' (2009) *Southeast European and Black Sea Studies* 9(1-2): 123-142.
[96] ICTY Annual Report 1994, para. 147
[97] L. Fletcher, 'Refracted justice: The imagined victim and the International Criminal Court' *in* C. De Vos, S. Kendall, C. Stahn (eds.) *Contested Justice: The Politics and Practice of the International Criminal Court Intervention* (Cambridge University Press, 2007) 302-325 at 303.
[98] J.N. Clark, 'Judging the ICTY: Has it achieved its objectives?' at 131.
[99] K. McEvoy and B. McConnachie, 'Victims and Transitional Justice': Voice, Agency and Blame' (2013) *Social and Legal Studies* 22(4): 489–513 at 497.
[100] K. McEvoy and B. McConnachie, 'Victims and Transitional Justice': Voice, Agency and Blame' at 497.
[101] Annual Report 1994, para.16; Annual Report 1997, para. 192; Annual Report 1998, para. 202 (quite extensive discussion on the Tribunal's contribution to reconciliation); Annual Report 199, para. 146 and 22; Annual Report 2000, para. 195; Annual Report 2001, para. 24 and 203 (the latter discussing Outreach as a tool for reconciliation).
[102] *Prosecutor v. Erdemović*, Judgement 29 November 1996, para. 58; *Prosecutor v. Delalić et al*., 16 November 1998, para. 1203; *Prosecutor v. Furundžija*, 10 December 1998, para. 288, *Prosecutor v. Todorović*, 31 July 2001, para. 91, *Prosecutor v. Mrđa*, 31 March 2002, and *Prosecutor v. P. Banović*, 28 October 2003, para. 66, 67 and 70.
[103] L. Fletcher, 'From Indifference to Engagement: Bystanders and International Criminal Justice' (2004) *Michigan Journal of International Law* 26(4): 1013-1096 at 1086.
[104] Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), para. 320 – "high expectation of justice conveyed by the parties to the conflict, as well as by victims, intergovernmental organizations, non-governmental organizations, the media and world public opinion."

solemn obligation".[105] Damaška, often drawing on the practice and rhetoric of the ICTY,[106] argued that international criminal justice simply became too ambitious, proclaiming too many (often conflicting) objectives with no established hierarchy among them. He warned of "unfulfilled expectations and inconsistencies [as being] harmful to any system of justice, and especially to an evolving one, whose legitimacy in the communities affected by international crime is still delicate".[107] He recommended, along with others[108] the pruning of "unrealistic aspirations".[109] Stover urged the Tribunal to adopt a "more realistic view of what trials can accomplish".[110] These practical propositions echo McEvoy's call for international lawyers to demonstrate some legal humility.[111] This research posed to what extent UER was perceived by victims, and other stakeholders in the region, as another unmet expectation (did these stakeholders expect perpetrators' sentences to be served in full) and, if yes, to what extent did this unmet expectation impact on their perception of the Tribunal's legitimacy?

4.3.2. Tribunal's Relationship with the Regional Stakeholders

Justice dispensed should serve the community it holds jurisdiction over.[112] Frequently, scholars take this principle for granted, though some place an emphasis on it: "We must first assume that the intention of those that design judicial institutions and those who work within them is to improve collectively the lives of those people in whose name they provide justice".[113] This thesis shares the overall belief that ICTs should seek to obtain and maintain legitimacy in the region. The law's outcomes have percussions beyond that of the perpetrator convicted or acquitted, as Chapters 7

[105] N. Patterson, 'Silencing Victims in International Courts: Neglecting a Solemn Obligation' (2003) *Georgetown Journal of International Affairs* 4(1) 95-100.
[106] M. Damaška, 'What is the Point of International Criminal Justice?' at 331.
[107] M. Damaška, 'What is the Point of International Criminal Justice?' at 365.
[108] C. Stahn, 'Between 'Faith' and 'Facts': By What Standards Should We Assess International Criminal Justice?' (2012) *Leiden Journal of International Law* 25: 251–282 at 257 – "There may be a need for a greater degree of realism (i.e., a better factual understanding of international criminal justice) in order to assess its strengths and weaknesses".
[109] M. Damaška, 'What is the Point of International Criminal Justice?' at 365.
[110] E. Stover, *The Witnesses*, 144 cited in J.N. Clark, 'Judging the ICTY: Has it achieved its objectives" at 137. This included the rhetoric of the Tribunal's work as contributing to not simply restoration of "peace" but of "reconciliation" – Clark noted that this was not an original part of its mandate but pinpoints that the Tribunal began this rhetoric and thus "the fact that the Tribunal's work has been regularly and explicitly associated with reconciliation, means that it is both important, and entirely appropriate, to examine whether the ICTY has indeed contributed to inter-ethnic reconciliation in the former Yugoslavia" at 39.
[111] K. McEvoy 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice' (2007) *Journal of Law and Society* 34(4): 411-440, at 411.
[112] As Chapter 3, s. 3.6.5 outlined, see J. Raz, *The Morality of Freedom* (Oxford University Press, 1988) at 53 and 56 – cited in S. Aambolangvan and T. Squatrito, 'Conceptualising and Measuring The Legitimacy of ICTs' in N. Hayashi and C. M. Baillliet (eds.) *The Legitimacy of International Criminal Trials* (Cambridge University Press, 2017) at 50.
[113] J. Meernik, 'Justice and Peace? How the International Tribunal Affects Societal Peace in Bosnia' (2005) *Journal of Peace Research* 42(3): 271-289 at 275.

and 8 detail. Specifically for the ICTY, Patterson, along with others,[114] argued, "the Tribunal cannot simply ignore the wider mandate given to them by the UN Security Council" which, unlike other criminal courts, included, under the UNSCR establishing it, that the justice it dispensed would "contribute to the restoration and maintenance of peace".[115] Additionally, just as the Tribunal stated that it aimed to bring justice to the victims, it also articulated that it aimed to bring justice to the region;[116] thus their perceptions of its legitimacy matter and the relevant question is: to what extent did they perceive the justice dispensed by the Tribunal, in their name, as legitimate? For the purposes of this thesis this includes the premature ending of the justice dispensed; did they perceive this practice as legitimate?

The majority of empirical studies which have researched regional perceptions of the Tribunal have argued that the Tribunal largely failed to win over the "hearts and minds" of post-conflict society, key stakeholders.[117] This has been summed up by Subotić as she noted that the "ICTY legal proceedings have been staggeringly difficult for the local population to understand and internalize."[118] Scholars have attributed this failure to the nature of the Tribunal, its dependence on states to provide resources, the infancy of ICL and practice, and its focus on its international influential stakeholders (UNSC Members) rather than local ones (outlined above s.4.2) to explain the lack of engagement with the region. Glasius and Colona capture this initial oversight as the route of ongoing negative consequences as they reflected, "if the international community were not casting its expectations of the Tribunal in terms of benefits to the region, the failure of such benefits to materialize becomes less surprising".[119]

Although some scholars query whether the Tribunal could have combated FRY States' massive propaganda machines (state-sponsored media) intent on distributing malicious rumours and fostering negative perceptions,[120] many observers argued the Tribunal should and could have done more to tackle negative perceptions. Hodžić, critiquing the Tribunal judges for prioritising the

[114] M. Klarin, 'The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia' (2009) *Journal of International Criminal Justice* 7: 89-96 at 96 – "The ICTY mandate is not limited to the prosecution and punishment of persons responsible for crimes and deterring possible future wrongdoers; it is expected to contribute to a lasting peace, democracy, protection of human rights and inter-ethnic reconciliation in the Balkans" at 96.
[115] UNSCR 808 cited in N. Patterson, 'Silencing Victims in International Courts: Neglecting a Solemn Obligation' at 96.
[116] Annual Report 1998, "prosecution of persons responsible for serious violations of international humanitarian law removes such persons from their communities, and, if found guilty, ends their impunity and facilitates the through its judicial proceedings reconciliation of those communities. In addition the Tribunal establishes a historical record which provides the basis for the long-term reconciliation and reconstruction of the region" para. 201.
[117] M. Klarin, 'Tribunal's Four Battles' (2004) *Journal of International Criminal Justice* 2(2): 552.
[118] J. Subotić, *Hijacked Justice: Dealing with the Past in the Balkans* (Cornell University Press, 2009) at 132.
[119] M. Glasius and F. Colona, 'The Yugoslavia Tribunal: The Moving Targets of a Legal Theatre' at 14.
[120] R. Kerr, 'Peace through Justice: The International Criminal Tribunal for the Former Yugoslavia' at 379.

development of ICL and overlooking its stakeholders (s. 4.2.3), also made a valuable point, that speaks to the theory of performance legitimacy;[121] "everything the court does is outreach".[122] Others have gone further, and critiqued the Tribunal judges for refusing to recognise this broader societal role including politics. Klarin,[123] like Hodžić, attributed this neglect to a judicial legalist tendency to "concentrate on the technical elements of the crimes and the procedure … concerned only with claims that some legal rules may be violated in the procedure".[124] This meant they cast aside other matters as "political'', perceived as an area into which judges should not stray.[125] This stance, Klarin argued, was an error, as the reality was that regional stakeholders viewed all judgments as political rather than legal. These perceptions were not limited to judgments but who the Tribunal prosecuted. Lawyer Schrag argued that the OTP paid too little attention as to how its "political context … [of] prosecutorial strategies" would be viewed in the former Yugoslavia.[126] J.N. Clark, writing as a socio-legal scholar, argued that politics infuses the Tribunal's work and called for attitudes and practice to change accordingly, "this is the ontological reality which these institutions exist in and with which they must engage."[127] These observers and scholars[128] have urged the Tribunal to do more to "improve its image and get its message across to the region".[129] In turn, the Tribunal has provided lessons for other ICTs, that judges be attuned to lay people in developing international procedure. Damaška asserted that if ICTs are to achieve their "didactic mission they should avoid the perception of cloistered isolation from the intuitions of ordinary people".[130] This research's interviews with judges and other internal stakeholders queried the extent to which these scholarly criticisms had been heard: did the judges' consider the politics of the region in the grant of UER? Had any actions been taken to enhance their perceived legitimacy of exercise in the region, in particular when it came to UER?

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[121] K. McEvoy and A. Schwartz 'Judges, Conflict, and the Past' (2015) *Journal of Law and Society* 42(4): 528-555.
[122] R. Hodžić, 'Accepting a difficult truth: ICTY is not our court'. Balkan Insight, cited in J. Subotić, 'Legitimacy, Scope and Conflicting Claims on the ICTY: In the Aftermath of Gotovina, Haradinaj and Perišić' (2014) *Journal of Human Rights* 13: 170-185, at 178.
[123] R. Hodžić, as Klarin, also has a background in journalism rather than law or academia, see: https://harriman.columbia.edu/event/justice-unseen [accessed 14/12/2019]
[124] M. Klarin, 'The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia' at 96.
[125] K. McEvoy and A. Schwartz 'Judges, Conflict, and the Past' (2015) *Journal of Law and Society* 42(4): 528-555. See Chapter 3, s.3.4.3.
[126] M. Schrag, 'Lessons Learned from ICTY Experience' (2004) *Journal of International Criminal Justice* 2: 427-434.
[127]J.N. Clark, 'International Criminal Courts and Normative Legitimacy: An Achievable Goal?' (2015) *International Criminal Law Review* 25(4):763-783. Argued that the power of courts is contingent on political actors necessarily means that politics infuses their work.
[128] J.N. Clark, 'The Impact Question: The ICTY and the Restoration and Maintenance of Peace' in B. Swart, A. Zahar and G. Sluiter (eds.) *The Legacy of the ICTY* (Oxford University Press, 2011) at 76; M. Klarin, 'The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia' 90, cited in M. Glasius and F. Colona, 'The Yugoslavia Tribunal: The Moving Targets of a Legal Theatre'.
[129] M. Klarin, 'Building the ICTY Legacy for Local Communities' in R. Steinberg (ed.) *Assessing the Legacy of the ICTY* (Martinus Nijhoff Publishers, 2011) at 111.
[130] M. Damaška, 'The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals' (2011) *North Carolina Journal of International Law and Commercial Regulation*, XXXVI, at 386.

Empirical research and surveys[131] indicate that the ICTY's exercise of power, its indictments, sentences imposed and judicial findings are viewed from a position of ethnic-political allegiances[132] rather than a legal perspective. Studies have concluded that "Bosnia-Herzegovina is a deeply divided society"[133] and that "each of the three national communities … the Serbs, the Croats, and Muslims, views itself as a victim and not as a perpetrator of aggression and the atrocities against the other parties".[134] Ethnic allegiances remain a dominant factor in determining whether sentencing decisions are considered too lenient or severe;[135] and further, in the Serb dominated Republika Srpska (RS) there remains a lack of acknowledgement of the crimes altogether.[136] This denial has been blamed by a number of scholars on outreach, often seen as "too little too late".[137] The Tribunal's overall "lack of a coherent and effective strategy for outreach"[138] when it did engage with the region, has compounded this. Yet, behind this broad picture, a more nuanced one emerges as statistics are disaggregated. Kutnjak Ivković and Hagan's study, for example, recognised that, some victims, in particular those who have engaged with BiH courts, perceived the Tribunal's rulings to be fair and impartial.[139] At the more general level of over legitimacy, Clark's studies have noted that some victims, although critical of the Tribunal's sentencing and acquittals, were nevertheless "glad" that

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[131] Belgrade Centre for Human Rights surveys conducted in 2010 and 2012. These surveys, sponsored by the OSCE, analyzed by M. Milanović 'The Impact of the ICTY on the Former Yugoslavia: An Anticipatory Postmortem' (2016) *The American Journal of International Law* 110: 233-259 at 253.

[132] R. Kerr, 'Peace through Justice: The International Criminal Tribunal for the Former Yugoslavia' at 376 and J. Subotić Expanding the scope of post-conflict justice: Individual, state and societal responsibility for mass atrocity' (2011) *Journal of Peace Research* 48(2): 157-169 at 166.

[133] F. Beiber, *Post-War Bosnia: Ethnicity, Inequality and Public Sector Governance* (UNRISD and Palgrave Macmillan, 2006) at 1.

[134] D. Saxon, 'Exporting Justice: Perceptions of the ICTY Among the Serbian, Croatian and Muslim Communities in the Former Yugoslavia' (2005) *Journal of Human Rights* 4: 559-572 at 562 – citing a legal officer at the ICTY, rather than Saxon's own experience.

[135] M. Glasius and F. Colona, 'The Yugoslavia Tribunal: The Moving Targets of a Legal Theatre' in D. Abazović, M. Velikonja (eds.) *Post-Yugoslavia* at 18-19 and Clark, Saxon, Klarin 'Building the Legacy for Local Communities' in R. Steinberg (ed.) *Assessing the Legacy of the ICTY* (Martinus Nijhoff Publishers, 2011) at 118 – "The sentences ordered by the ICTY are generally views as grossly inadequate".

[136] M. Milanović, 'ICTY on the Former Yugoslavia: An Anticipatory Postmortem (2016) *The American Journal of International Law* 110: 233-259 at 244 and see: '*Bosnian Serb TV Station Fined for False Report on Massacre'* BIRN, 18 October 2019 – "Radio Television Republika Srpska … aired a report in May this year which contained claims that the victims died because a bomb was placed at the Tuzla Gate site by Bosniaks, and that they were not killed by a shell fired by Bosnian Serb forces as the courts have established". See: https://balkaninsight.com/2019/10/18/bosnian-serb-tv-station-fined-for-false-report-on-massacre/?utm_source=Balkan+Transitional+Justice+Daily+Newsletter+-+NEW&utm_campaign=5087de2d5b-BTJ_EN&utm_medium=email&utm_term=0_a1d9e93e97-5087de2d5b-319767961 [accessed 13/12/2019]

[137] J.N. Clark, 'Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation' (2009) *The European Journal of International Law* 20(2): 415-436 at 422 or– "a decade [after its establishment) outreach activities were still found to be woefully inadequate" M. Glasius and F. Colona, 'The Yugoslavia Tribunal: The Moving Targets of a Legal Theatre' in D. Abazović, M. Velikonja (eds.) *Post-Yugoslavia* (Palgrave Macmillan, 2014) at 15, citing D. Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (Open Society Justice Institutive and ICTJ, 2010).

[138] R. Kerr, 'Peace through Justice: The International Criminal Tribunal for the Former Yugoslavia' at 376.

[139] S. Kutnjak Ivković and J. Hagan,' Pursuit of justice and the victims of war in Bosnia and Herzegovina: An exploratory study' (2016) *Crime Law Social Change* 65: 1-27, at 18.

the ICTY "existed".[140] Orentlicher's research revealed the opinion that "some justice was done"[141] was better than none, and more recently that "the Tribunal has rendered a measure of justice … [which] however flawed, is infinitely preferable to no justice at all".[142] These more nuanced findings and discussions demonstrate, as do this thesis' findings (Chapters 7 and 8), that perceptions of an institution's legitimacy are *relevant* to perceptions of legitimacy of other institutions and individuals' lived experience of those.[143]

4.4. The Tribunal's Penal Practices Under Scrutiny

The above literature exploring the sociological legitimacy of the Tribunal's dispensation of justice for victims and society as a whole is complemented by literature assessing the Tribunal's normative legitimacy of its exercise of power, through analysis of its practice and judgments.[144] As these assessments do not occur in a vacuum, sentencing judgments are seen and heard by the Tribunal's multiple audiences, including stakeholders, researchers have also discussed the perceived legitimacy of these judicial determinations, noted herein. The following section outlines the literature on the most contested areas of judicial penal reasoning in, and practice of, sentencing, repeated in the topic of this thesis – perpetrators' UER from the declared sentence.

4.4.1. Plea-Bargaining

Initially, the Tribunal categorically rejected plea-bargaining given the gravity of the crimes for which the accused were indicted.[145] The formal introduction of plea-bargains in 2002[146] is an example of the Tribunal's practice being reversed. Plea-bargaining was introduced at the insistence of influential stakeholders, particularly America, who wished for more expedient justice of an expensive dispensation of justice.[147] Plea-bargaining, it was further hoped, would assist in gathering evidence

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[140] J.N. Clark, *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia* (Routledge, 2014) at 59.
[141] D. Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (Open Society Justice Institutive and ICTJ, 2010) at 34.
[142] D. Orentlicher, *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia* (Oxford University Press, 2018) at 128.
[143] S. Kutnjak Ivković and J. Hagan, *Reclaiming Justice; The ICTY and Local Courts* (Oxford University Press, 2011) who argued that "Individuals' views of the ICTY's legitimacy and fairness are likely affected by environment in which they reside" at 81.
[144] R. Henham, 'Evaluating the Contribution of Sentencing to Social Justice: Some Conceptual Problems' (2012) *International Criminal Law Review* 12: 361-373.
[145] M. Scharf, 'Trading Justice for Efficiency: Plea-Bargaining and International Tribunals' (2004) *Journal of International Criminal Justice* 2: 1070-1081 at 1073.
[146] R. Henham and M. Drumbl, 'Plea Bargaining at the International Criminal Tribunal for the Former Yugoslavia' (2005) *Criminal Law Forum* 16: 49-87 - 'Plea bargains' or 'charge bargains' were introduced into the RPE in 2001 through an amendment to the 'pure guilty plea'. They note that the 'pure guilty plea' under Rule 62(VI) and 62 bis were originally envisaged by the ICTY and were not foreign to international criminal tribunals, at 51.
[147] R. Rauxloh *Plea Bargaining in National and International Law* (Routledge, 2012) at 206.

for higher-level, senior military and political figures, to be indicted.[148] Many academics have queried both the normative (often explicitly its moral core)[149] and sociological legitimacy of plea-bargaining.[150] Three specific legitimacy deficits are levied against the practice of plea-bargaining: first, its inappropriateness due to the nature and gravity of the crimes; second, the practice's capacity to distort the record, the truth of the crimes; and, third, the injustice done to victims. These three legitimacy deficits of plea-bargaining are all reflected in the practice of UER as discussed in Chapters 6 (the inappropriateness), 7 (the capacity to distort the truth) and 8 (an injustice to victims).

Plea-bargaining first initial legitimacy deficit was articulated by the Tribunal's first President, Cassese, who asserted that the accused's indictments should not be altered as these were the "gravest possible of all crimes [and] no matter how useful their testimony may otherwise be … no one should be immune from prosecution".[151] Drumbl and Henham query the "moral legitimacy"[152] of plea-bargaining. Firstly, they noted the practice being at odds with the Tribunal's stated purposes of punishment, primarily retribution.[153] They argued "by punishing people differently based on administrative contingencies, the ICTY moves away from punishing people differently based on the gravity of the crime or the level of their desert".[154] This moral questioning was also posed by victims who could not reconcile the disconnect between the crime admitted to, and the sentence imposed. In a victim-witness's own words, "I felt glad that [Deronjić] admitted his guilt. I do not, however, understand how it is possible to give him a lenient term of imprisonment after what he himself confessed".[155] As well as the difficulty victims (as well as the first President) had with comprehending how the most severe crimes admitted to could result in a lower sentence, their surprise and disappointment may have been compounded by the fact that plea bargains were not a practice in the FRY,[156] and shocked and angered many as it was practiced by the Tribunal.[157] Plea bargains,

[148] J.A. Cook, 'Plea Bargaining at The Hague' (2005) *Yale Journal of International Law* 30(2): 473-506 at 498.
[149] R. Henham and M. Drumbl, 'Plea Bargaining at the International Criminal Tribunal for the Former Yugoslavia' (2005) *Criminal Law Forum* 16: 49-87, who query the "moral legitimacy" of plea-bargaining at 76.
[150] J. Clark, Combs, Scharf.
[151] The US Government had proposed plea-bargaining for the sake of gaining cooperation to elucidate evidence for high-level figures, cited in M. Scharf, 'Trading Justice for Efficiency: Plea-Bargaining and International Tribunals' (2004) *Journal of International Criminal Justice* 2: 1070-1081 at 1073 citing V. Morris and M.P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* (Transnational Publishers, 1995) at 649 and 652.
[152] R. Henham and M. Drumbl, 'Plea Bargaining at the International Criminal Tribunal for the Former at 76.
[153] It is a contradiction which is replicated at the grant of early release.
[154] R. Henham and M. Drumbl, 'Plea Bargaining at the International Criminal Tribunal for the Former Yugoslavia' at 56.
[155] J.N. Clark, 'Judging the ICTY: Has it achieved its objectives?' (2009) *Southeast European and Black Sea Studies* 9(1-2): 123-142 at 431.
[156] S. Kutnjak Ivković, 'Justice by the International Criminal Tribunal for the Former Yugoslavia' (2001) *Stanford Journal of International Law* 37: 255 at 288 J. Cook, 'Plea Bargaining at The Hague' (2005) *Yale Journal of International Law* at 487.
[157] J.A. Cook, 'Plea Bargaining at The Hague' at 498 cited in J.N. Clark, 'Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation' (2009) *The European Journal of International Law* 20(2): 415-436 at 422.

resulting in a lower sentence, were widely perceived as lacking a moral justification for the majority of scholars and those in the region, and, consequently, was sociologically illegitimate.[158] This research saw potential parallels in the practice of plea-bargaining, resulting in a lower sentence, as inappropriate given the gravity of the crimes with early release from imprisonment for perpetrators of atrocity crimes.

The second legitimacy deficit of plea bargains was that the bargains struck were at odds with some Tribunal judges' rhetoric that guilty pleas contributed to the Tribunal's production of truth.[159] This assertion was doubted by a number of the judges themselves, as well as academics.[160] Thus, within the Tribunal, there existed no "shared beliefs"[161] of Rule 62*ter*[162] being justifiable. This was particularly true for pleas where charges from the indictment, including genocide,[163] and charges for specific atrocities were struck off. An "incomplete truth"[164] was subsequently recorded. Scharf's argument went further, "dropping charges has the effect of editing out the full factual basis … and thus has the potential to distort the historic record generated by the Tribunal".[165] The assertion, by some judges, that guilty pleas produced an authoritative record of the crimes[166] was dismissed by many scholars. Combs critiqued the Tribunal for "conclud[ing] plea agreements without providing prosecutors virtually any details about the crimes to which they pled guilty". She highlighted the missed opportunity of Plavšić's guilty plea. As Plavšić was in a key political position and played a "role in the ethnic-cleaning campaign", her plea had the potential to provide "insights into every

[158] J.N. Clark, 'Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation' (2009) *The European Journal of International Law* 20(2): 415-436; and S. Kutnjak Ivković and J. Hagan, 'The Politics of Punishment and the of the Siege of Sarajevo: Toward a Conflict Theory of Perceived International (In)Justice' (2006) *Law & Society Review* 40(2) found only 6% of their interviewees supported plea-bargaining at the Tribunal at 396. The authors conducted 'two purposive samples were collected by the same interviewer, with 299 respondents in 2000 and 473 respondents in 2003'.

[159] *Prosecutor v. Mrđa*, Case No. IT-02-59-S, Trial Chamber judgement, 31 March 2004 noted "a guilty plea … helps establish the truth" at 76.

[160] Most notably in M. Nikolić, noted in J.N. Clark, 'The Limits of Retributive Justice', at 475 – the judges reflected that plea bargains might create "an unfortunate gap in the public and historical record on the create case", *Nikolić*, Trial Chamber Judgement, 2 December 2003, para. 122.

[161] See Chapter 3, s.3.3. That is D. Beetham's model of legitimacy; firstly, that the rules were legally valid, secondly that they were justifiable according to shared beliefs (i.e. morally legitimate) and that they were 'consented' to, sociologically accepted.

[162] Rule 62*ter*, adopted in the RPE 13 December 2001, allowed for the Prosecutor and the defence to agree for the accused to enter guilty for some indictments and for others to be subsequently dropped; and also to recommend a sentencing range.

[163] Momir Nikolić, D. Obrenović and B. Plavšić cited in R. Henham and M. Drumbl, 'Plea Bargaining at the International Criminal Tribunal for the Former Yugoslavia' (2005) *Criminal Law Forum* 16: 49-87.

[164] J.N. Clark, 'Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation' at 426.

[165] M. Scharf, 'Trading Justice for Efficiency: Plea-Bargaining and International Tribunals' at 1081, cited J.N. Clark, 'Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation' at 427.

[166] Sentencing judgments of: *Todorović*, 31 July 2001 at para. 81; *P. Banović*, 28 October 2003 at para. 68; *Češić*, 11 March 2004 at para. 28; *Mrđa*, 31 March 2004 at para. 76; *Babić* 29 June 2004 at para. 76; *Deronjić*, 30 March 2004 at para. 237; *Sikirica, Došen and Kolundžija,* 13 November 2001 at para. 149*; Zelenović,* 4 April 2007 para. 48; *M. Jokić*, 18 March 2004 at para. 77; *Dragan Nikolić*, 18 December 2003 at para. 53; *Momir Nikolić*, 2 December 2003 at para. 149; *Obrenović*, 10 December 2003 at para. 116; *Rajić*, 8 May 2006 at para. 146, and *M. Simić*, 17 October 2002 at para. 83.

aspect of its planning and implementation", yet Combs noted that the agreement was a "scant five-page factual [account] … presents only the briefest sketch of the atrocities".[167] Therefore, the truth recorded was minimal and given that charges such as genocide were dropped, could not be authoritative.[168]

Plea-bargains' third ascribed legitimacy deficit, when charges for specific atrocities were dropped, was that this was at odds with the Tribunal's larger rhetoric of giving voice to and providing justice to victims. Some judges had *inter alia* posed that "victims and witnesses are relieved from the possible stress of testifying at trial".[169] This is disputed by many, who argued that "for some victims testifying … may have significant cathartic value".[170] Again, this positive sentiment of victims being relieved from the stress of testifying was not shared by all judges, who expressed their distaste at the practice, and recognised the victims' interests in the dispensation of criminal justice for the accused. Certainly, it angered some victims denied victim status, as the Prosecutor dropped the crimes committed against them from the indictment. Whether it was their effective denial of victim status or the opportunity to testify, it has angered victims.[171]

Drumbl and Henham urged the Tribunal "not to overstate the truth-telling and reconciliatory effects of plea agreements".[172] The notion that the judges were over-stating the reconciliatory effects was highlighted in two empirical studies with victims. These studies found that, in contrast to Tribunal judges, victims were deeply suspicious of statements of remorse expressed by those pleading guilty.[173] As many victims could not accept perpetrators' remorse, expressed in a guilty plea, which resulted in a reduced sentence, the practice generally disturbed victims, making them less likely to reconcile.[174] This was highlighted by one victim who found it "offensive" when perpetrators who

[167] N.A Combs, *Guilty Pleas in International Criminal Law: Constructing a Restorative Approach* (Stanford University Press, 2007) at 196.
[168] N.A Combs, *Guilty Pleas in International Criminal Law: Constructing a Restorative Approach*.
[169] Sentencing Judgment, *S. Todorović*, 31 July 2001, para. 80, the Chamber considering it an 'important factor' that by pleading guilty, the accused 'relieves victims and witnesses of the necessity of giving evidence with the attendant stress which this may incur', cited in A. Tieger and M. Shin, 'Plea Agreements in the ICTY Purpose, Effects and Propriety' (2005) *Journal of International Criminal Justice* 3: 666-679 at 674.
[170] R. Henham and M. Drumbl, 'Plea Bargaining at the International Criminal Tribunal for the Former Yugoslavia' (2005) *Criminal Law Forum* 16: 49-87 at 57.
[171] *Prosecutor v. Milan and Sredoje Lukić*, 20 July 2009, paras. 37 and 800-801, cited in L. Moffet, *Justice for Victims Before the International Criminal Court* (Routledge, 2014) at 69.
[172] R. Henham and M. Drumbl, 'Plea Bargaining at the International Criminal Tribunal for the Former Yugoslavia' at 77.
[173] J.N. Clark, 'Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation' The term 'victims' is defined as including those who lost close members of their families, those who spent part of the war in concentration camps, landmine victims, those who were raped, and those who were ethnically cleansed from their homes.
[174] J.N. Clark, 'Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation' at 428.

pleaded guilty "get praised by the court for being very cooperative".[175] These studies are of relevance to UER as perpetrators' stated remorse has sometimes been considered at the grant of early release,[176] and this research posed the question to interviewees: what were their perceptions of perpetrators' remorse and the extent to which it should be considered at this stage?

Scholars recommended that the ICTY's Outreach Programme engage honestly with victims and "provide … much needed explanations" to ameliorate their disappointment.[177] This should be noted by other ICTs and the ICC, if such practices are to be adopted.[178] Clark believed that, "if victims were more informed … plea bargains would perhaps be less controversial.[179] Her argument is supported by other empirical studies which have found that better procedural justice (elements such as according respect to participants in an institution's process) would have a "cushioning effect" on negative decisions.[180] Outreach could have gone a step further, however; rather than simply informing victims Outreach could seek to highlight the practical benefits of plea agreements, especially when they provided evidence or assisted in bringing other perpetrators to justice. This was noted by Orentlicher's research in which one interviewee noted that "it would mean a lot ... [if it] led to mass graves or the conviction of others who were even more responsible".[181] Therefore, for this to be the case, it is important to better formulate plea bargains so as to ensure the perpetrators are obliged to cooperate with the Tribunal, and that cooperation leading to further evidence is emphasised in outreach efforts. Again, this had parallels with UER. In his consideration of an application for early release, the President is required to consider a prisoner's "substantial cooperation to the Prosecutor".[182] Did the President consider perpetrators' cooperation with the Prosecutor, and how?[183] Had this consideration been communicated and explained to people in the region?[184] To what extent did stakeholders in the region believe this was a reasonable justification to grant UER?

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[175] D. Orentlicher, *The Someone Guilty Be Punished* (Open Society Justice Initiative and ICTJ, 2010) at 63, citing Omarska survivor M. Duratović, as he spoke to the author regarding Mrđa's guilty plea, which resulted in lower sentence, as the judges' perceived his plea as a mitigating factor, due to, *inter alia*, assisting with providing the truth which could 'contribute to promoting reconciliation between the people of BiH', as cited on the ICTY's website.

[176] See Chapter 6, s.6.6.

[177] J.N. Clark, 'Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation' at 431.

[178] Although the Rome Statute provides no specific place in the Statute nor the RPE for guilty pleas or bargaining it does not specifically rule them out: see https://www.researchgate.net/publication/313430885_Plea_bargaining_in_international_criminal_justice_-_can_the_International_Criminal_Court_afford_to_avoid_trials [accessed 13/12/2019].

[179] J.N. Clark, 'Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation' at 431.

[180] R. Killean 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia' (2016) *International Criminal Law Review* 16: 1-38 at 4.

[181] D. Orentlicher, *That Someone Guilty Be Punished* at 51.

[182] ICYT Rules and Procedure of Evidence, Rule 125.

[183] See Chapter 5, s.5.4.

[184] Discussed throughout Chapters 6, 7 and 8.

4.4.2. The Judges' Sentencing Practices

Many scholars have queried the normative legitimacy of the Tribunal's sentencing determinations on three main grounds: first; perceived leniency,[185] second; inconsistency, and third; idiosyncrasy in mitigating factors. Most observers argue that the final sentences are frequently therefore not commensurate with the gravity of the crime.[186] This literature was relevant to UER as the practice *prima facie* appears as another act of idiosyncratic reasoning resulting in leniency toward individuals found guilty of atrocity crimes. This critique of eccentricity called for an examination of how it happened and the stated reasoning, through analysis of the early release decisions, and the extent to which the practice and the reasoning had an impact on the Tribunal's legitimacy in the eyes of stakeholders interviewed.

Just as plea-bargains were generally met with disappointment by victims' communities,[187] so too were the "surprisingly low" sentences handed down by the Tribunal.[188] Although it is widely recognised, in both the scholarship[189] and by victims themselves,[190] that no punishment could "mirror"[191] the gravity of the crime, some literature has articulated why, despite this recognition, this sense of disappointment remains, and has made proposals as to what can be done, if anything, to lessen the sense of disappointment. Hodžić described the sociological significance of sentencing "the length of ... the sentence is ... important because the sentence demonstrates recognition of victims' suffering".[192] Hodžić's assertion is articulated by a torture camp survivor, cited in Orentlicher's empirical study, who described the life-sentence handed down to Stakić (for his role in the crimes in Prijedor) as "very important for us symbolically".[193] Thus, the symbolism, denoted in the length of the sentence, does matter. This research examined the extent to which UER was

[185] There is one scholarly exception, Scalia, who proposes that life sentences are too harsh and potentially violate the prohibition of cruel and inhumane treatment. See D. Scalia, 'Long-Term Sentences in International Criminal Law: Do They Meet the Standards Set out by the European Court of Human Rights?' (2011) *Journal of International Criminal Justice* 9: 669-687

[186] There is a smaller body of literature which has defended the Tribunal's sentencing determinations as consistent S. D'Ascoli and M. Basset.

[187] J.N. Clark, 'Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation' 415 – 436.

[188] J.D Ohlin, 'Proportional Sentences at the ICTY' in B. Swart, A. Zahar and G. Sluiter (eds.) *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press, 2011) 322-341 at 324.

[189] M. Harmon and F. Gaynor, 'Ordinary Sentences for Extraordinary Crimes' (2007) *Journal of International Criminal Justice* 5: 683-712 at 688; J.D Ohlin, 'Proportional Sentences at the ICTY' 322-341.

[190] D. Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (Open Society Justice Institutive and ICTJ, 2010) at 53.

[191] R. Henham, 'The Philosophical Foundations of International Sentencing' (2003) *Journal of International Criminal Justice* 1(1): 64-85.

[192] R. Hodžić, 'A Long Road Yet to Reconciliation: The Impact of the ICTY on Reconciliation and Victims' Perspectives of Criminal Justice' in R. Steinberg (ed.) *Assessing the Legacy of the ICTY* (2011, Martinus Nijhoff Publishers Leiden) at 119.

[193] D. Orentlicher, 'That Someone Guilty Be Punished' 53 – although Stakić's life sentence was reduced to a forty-year sentence on Appeal, Orentlicher noted that Mr Ramulić was relieved that was not reduced further.

symbolic and what impact this had on the Tribunal's perceived legitimacy.[194] Orentlicher noted that despite there being a recognition even amongst victims, and a general assertion that victims of grave crimes will always be dissatisfied, she argued this did not mean that the length of the sentence did not matter. She noted that "many victims are discriminating in their assessment of the ICTY sentences; those who condemned short sentences readily acknowledged their satisfaction when the ICTY imposed sentences that seemed commensurate with the defendant's crimes".[195] Szoke-Burke sums up this sentiment of the symbolic to victims, as he accused the ICTY's sister *ad hoc* Tribunal's sentencing determinations as "belittling human suffering".[196] This sentiment is reflected in the work of Harmon and Gaynor, prosecutors at the ICTY, as they derided Krstić's 35-year sentence for his role in the genocide of 7,000-8,000 men and boys at Srebrenica.[197] They calculated the proportionality of the sentence using the minimum figure of 7,000 victims and found that "Krstić will spend 1.825 days in prison per murder victim. If he is released after serving two-thirds of his sentence, which is the consistent practice at the ICTY, he will have served 1.205 days in prison per murder victim".[198] The particular framing of days distracts from their valid overall argument, similar to Szoke-Burke as they argued that "a day or two in prison for the murder of a human being [is] inconsistent with any serious notion of human dignity".[199] This research posed to what extent UER of perpetrators of atrocity crimes was another act perceived as disregarding the dignity of victims, a lenient sentence effectively reduced at early release.

In relation to the ICTY, Ohlin advocated for symbolic sentences which would have the same of life sentences. Acknowledging a formalistic approach, Ohlin proposed symbolic sentences would denote not only the gravity but the typology of the perpetrator. He suggested that low-rung-perpetrators' sentences to range from 50 years, mid-range to 100 years and "the most deserving might receive sentences in excess of 1,000 years".[200] He noted that given the expectancy of around 53,064 years,[201] these sentences will not be the lived reality but symbolic.[202] He urged for the application of the principle of "offence-gravity proportionality … even moderate participation in international

[194] See Chapters 7 and 8.
[195] D. Orentlicher, 'That Someone Guilty Be Punished' at 53
[196] S. Szoke-Burke, 'Avoiding Belittlement of Human Suffering A Retributivist Critique of ICTR Sentencing Practices' (2012) *Journal of International Criminal Justice* 10: 561-580. Although Szoke-Burke argued this in relation to the ICTR, J.D. Ohlin, although not been so direct has called for symbolic sentences to reflect the gravity of the crimes at the ICTY.
[197] On Appeal, the Appeal Chamber overturned his conviction for genocide and found him guilty of the lesser crime of 'aiding and abetting' genocide'. His 47-year sentence was thus reduced to 35 years.
[198] M. Harmon and F. Gaynor, 'Ordinary Sentences for Extraordinary Crimes' at 692.
[199] M. Harmon and F. Gaynor, 'Ordinary Sentences for Extraordinary Crimes' at 692.
[200] J.D Ohlin, 'Proportional Sentences at the ICTY' at 338.
[201] See: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Healthy_life_years_statistics#Healthy_life_years_at_birth [accessed 13/12/2019].
[202] J.D Ohlin, 'Proportional Sentences at the ICTY' at 337.

crimes … reflect the inherent gravity of the offence [and thus] wield a life sentence".[203] Symbolic sentencing would have been a means to address, what has been described by Drumbl as, the divergence between the "proclaimed extraordinary nature of atrocity crimes [and the] modality of punishment [which has] remain[ed] disappointingly ordinary".[204] Responding to the critique of a lack of realism, Ohlin emphasised these sentences "have a symbolic resonance that capture the alleged level of culpability in the case".[205] Indeed, symbolic sentences would be more in line with the first two purposes for sentencing provided by the ICTY, namely retribution and deterrence.[206] Ohlin also counters potential human rights concerns of *de facto* life sentences, (outlined below by Scalia), as he noted, like Harmon and Gaynor that symbolic sentences are "simply aggregating a modest prison sentence for each death that a particular defendant was responsible for".[207] However, symbolic sentencing, based on offence gravity, which does not account for the perpetrator's individual circumstances, does not appear to align with human rights principles, outlined below. As atrocity crimes are fundamentally grave human rights violations committed by individuals, it would be incongruous not to acknowledge the human rights of the perpetrators. Nevertheless, this thesis argues that this principle means that a genuine examination of the perpetrator's individual circumstances must be undertaken when early release is considered, detailed in Chapters 5 and 6.

One exception is noteworthy in relation to the dominant literature critical of the ICTs sentencing for lenient sentences, and effectively responds to Ohlin's recommendations of effective life sentences. Scalia expressed concerns that life sentences handed down by the Tribunal could be, under strict reading of the ICTY Statute, incompatible with the European Convention on Human Rights (ECHR) and may constitute a "slow death".[208] Irreducible life sentences with no possibility for a *proper* review violate Article 3 as determined by *Stafford v. the UK* (2002).[209] The ECtHR asserted that persons "incarcerated without any prospect of release and without the possibility of … review … risk[ed] that he could never atone for his offence and … however exceptional his progress towards rehabilitation, his punishment would remain fixed".[210] The ECtHR determined that this violated human dignity, could constitute inhumane and degrading treatment under Article 3, the most

[203] J.D Ohlin, 'Proportional Sentences at the ICTY' at 337.
[204] M. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, 2007) at 6.
[205] J.D. Ohlin, 'Proportional Sentences at the ICTY' at 338.
[206] B. Holá, 'Sentencing of International Crimes at the ICTY and ICTR Consistency of Sentencing Case Law' (2012) *Amsterdam Law Forum* 4(4): 3-24.
[207] J.D Ohlin, 'Proportional Sentences at the ICTY' at 338.
[208] D. Scalia, 'Long-Term Sentences in International Criminal Law: Do They Meet the Standards Set out by the European Court of Human Rights?' (2011) *Journal of International Criminal Justice* 9: 669-687.
[209] The Strasbourg Court has reaffirmed this more recently, *Hutchinson v. the UK* (2015) emphasising that life sentences in themselves are not incompatible with Article 3 so long as they are reviewable and reviewed by an independent and impartial body. The reasoning set out by the Court echoes the principle of human dignity.
[210] *Hutchinson v. the United Kingdom,* ECtHR (2015) para. 111-112.

fundamental of rights protected under the ECHR. This judgment and Scalia's critique of the Tribunal were relevant to the Tribunal's practice of UER: to what extent was this belief held by judges at the Tribunal? Was the grant of UER a means for them to give the perpetrator a second chance? This consideration was posed as the early release decisions were analysed and throughout the semi-structured interviews[211] with stakeholders, both insiders at the Tribunal and outsiders in BiH.

Further, Scalia questioned the ICTY's Statute provision for a pardon or commutation of sentence. Scalia argued the President's discretionary decision, which is non-appealable,[212] renders the practice "inconsistent with the ECtHR jurisprudence".[213] Although the President's decision is non-appealable, the amended Practice Direction (2009) allows the perpetrator to submit an application for early release at any time, and the enforcement state to do so when the perpetrator becomes eligible under its national laws. Effectively this means perpetrators serving their life sentences will have their sentence reviewed; though the legitimacy challenge Scalia identified - the decision resting with the President, at his discretion and the ultimate decider, remained. Scalia's assertions are correct on the black letter of the Statute. Others, however, have demonstrated that the black letter law on the grant of a pardon or commutation of sentence is radically different from the practice adopted by the Presidents to date.[214] (See below s.4.5, Chapter 5 on the Tribunal's practice and Chapter 6 on the Presidents' considerations of perpetrators' demonstration of rehabilitation).

In addition to judicial reasoning being challenged, many scholars have noted inconsistencies in sentencing lengths as a legitimacy deficit of the Tribunal's exercise of power. This was not a universal assertion, as there is a smaller number of scholars who argued that there were discernible patterns in the ICTY sentencing; according to these scholars high-level perpetrators, in particular those who were instigators of crimes, received higher sentences, as did perpetrators of direct violence against vulnerable victims.[215] Generally, however, academics widely share the view that the Tribunal's sentencing was inconsistent[216] and this ran counter to the one Trial Chamber determination which

[211] As the interviews were semi-structured this question was not always posed, and not to all interviewees. The question was primarily posed to judges and lawyers. The notion of a second chance was often asked as a follow-up question to the interviewee's answer.
[212] Under the ECHR a prisoner has the right to have their sentence reviewed, and done so by an independent and impartial body of the state, rather than an individual, who is part of the government.
[213] D. Scalia, 'Long-Term Sentences in International Criminal Law: Do They Meet the Standards Set out by the European Court of Human Rights?' at 675.
[214] J. Choi, A. Merrylees and B. Holá et al.
[215] M. Bassett, 'Defending International Sentencing: Past Criticism to the Promise of the ICC' (2009) *Human Rights Brief* 16(2); D'Ascoli *Sentencing in International Criminal Law: The UN ad hoc Tribunals and Future Perspectives for the ICC* (Hart Publishing, 2011); and J. Meernik and K. King, 'The Effectiveness of International Law and the ICTY - Preliminary Results of an Empirical Study' (2001) *International Criminal Law Review* 1: 343-372.
[216] M. Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press, 2007) at 59.

recalled that "[o]ne of the fundamental elements in any rational and fair system of criminal justice is consistency in punishment".[217] This critique was articulated by Henham who argued that "obfuscation and confusion by international sentences in articulating the connections between penal justifications and sentences … not only undermines the development of rational sentencing principles, it also weakens the legitimacy of international punishment".[218] Many academics called for sentencing guidelines, a task that the Tribunal declined to take up. The Tribunal asserted an "overriding obligation to individualise a penalty to fit the individual circumstances of the accused and the gravity of the crime".[219] Drumbl responded to this judicial assertion convincingly, as he argued that a general measure is needed around which judges can individualise: "Although individualising the penalty is certainly desirable, the benefits thereof dissipate when there is no coherent framework in which to predictably consider the factors to … sentencing".[220] Beresford cautioned that an absence of sentencing guidelines could mean "unstructured discretion allow[ing] personal preferences of a judge and may permit discrimination, individual idiosyncrasy and other irrelevant influence[s]" to affect sentencing practice.[221] This forewarning of idiosyncratic reasoning was realised at sentencing (discussed below) and, as Chapter 6 details, was repeated throughout Presidential decisions on UER as they considered perpetrators' demonstration of rehabilitation.

A number of idiosyncrasies in judicial reasoning which provided for mitigating circumstances in sentencing were detailed by Galbraith. Galbraith discussed judges' consideration of "good deeds" by the perpetrator and their apparent impact on sentencing, although, due to a lack of guidelines, the tangible impact remains unknown. Galbraith identified two types of "good deeds" discussed by judges, and two ways in which the good deeds were considered, both of which reflect Beresford's caution against inconsistency and idiosyncrasy. The two types of good deeds were: first, assistance to direct victims, and, second, assistance to members of the same ethnic group as the victims of the crimes being prosecuted.[222] The judgments provide no reference as to how these good deeds (as mitigating circumstances or evidence of good character) were to be considered at sentencing.

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[217] *ICTY Prosecutor v. Zejnil Delalic´ et al*., Appeal Judgment, 20 February 2001 and *Prosecutor v.* Goran *Jelisić*, Appeal Judgment, 5 July 2001, para. 96 referenced D. Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (Open Society Justice Institutive and ICTJ, 2010) at 54.

[218] R. Henham, 'The Philosophical Foundations of International Sentencing' (2003) *Journal of International Criminal Justice* 1(1): 64-85, set out in the Article's Abstract.

[219] D. Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (Open Society Justice Institutive and ICTJ, 2010) at 159.

[220] M. Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press, 2007) at 69.

[221] S. Beresford, 'Unshackling the paper tiger - the sentencing practices of the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda' (2001) *International Criminal Law Review* 1: 33-90 at 84.

[222] J. Galbraith, 'The Good Deeds of International Criminal Defendants' (2012) *Leiden Journal of International Law* 25(3): 799–813 at 807.

These idiosyncrasies demonstrate how subjective judicial determinations were. Galbraith compared cases to argue the Tribunal's apparent subjectivity in determining good deeds. In the case of Vuković, found guilty of twice raping a 16-year-old girl, the defendant argued on appeal that the judges should have considered in mitigation the aid he had provided to Muslims in general during the war. The judges rejected this request, asserting that the "Appellant's help to other Muslims in the conflict does not change the fact that he committed serious crimes against FWS-50. If he is to be punished for his acts against FWS-50, it is to these acts that any possible mitigating factors should be linked".[223] Galbraith contrasts the approach taken by the judges in *Vuković* to judges in *Simić et al*.[224] whereby the judges considered, without elaboration, that Miroslav Tadić's good deeds throughout the war (rather than good deeds directed at specific victims) were relevant to sentencing.[225] Additionally, the judges' belief that good deeds to other ethnicities constituted evidence of a reformable character[226] appear to overlook the context of the crime and the criminals, who, as Luban noted, were not criminals before the war, they may have been "ordinary, law-abiding citizens, good men and good-neighbours, in peacetime".[227] The demonstration of good deeds, rather than evidence of a reformable character, was evidence of their general character which had failed them during the war. Galbraith's examples are pertinent to the grant of UER; as Chapter 6, s.6.6 discusses there is a number of factors the President considers as evidence of rehabilitation which do not appear to take into account the context of atrocity crimes, and their discriminatory based nature.

The dominant feature of the sentencing practice was the lack of consistency[228] and clarity. The Tribunal did not heed calls for the "objectives of sentencing [to be] clarified and re-evaluated [given the nature of the crimes] and "make the sentencing process more transparent".[229] The recognition of this shortcoming, the Tribunal's judicial reasoning lacking transparency and articulation of reasoning, is not only a criticism of sentencing but other areas of practice by the judges as they wrote their own rules and procedures (s.4.5.1).

4.4.3. Leniency Concerns

Before turning to enforcement and UER, pertinent concerns were raised that judges were unduly lenient in their treatment of those accused of atrocity crimes as they granted provisional release to

[223] *Prosecutor v. Kunarac* et al, in J. Galbraith, 'The Good Deeds of International Criminal Defendants' at 807.
[224] J. Galbraith, 'The Good Deeds of International Criminal Defendants' at 808.
[225] J. Galbraith, 'The Good Deeds of International Criminal Defendants' at 808.
[226] J. Galbraith, 'The Good Deeds of International Criminal Defendants' at 808.
[227] D. Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law' in S. Besson and J. Tasioulas (eds.) *The Philosophy of International Law* (Oxford University Press, 2009) at 575.
[228] J.D Ohlin, 'Proportional Sentences at the ICTY', 322-341.
[229] M. Harmon and F. Gaynor, 'Ordinary Sentences for Extraordinary Crimes' at 712.

those accused pending and during trial. This criticism echoed the criticism of scholars and prosecutors above who were displeased at the Tribunal's apparent lack of differentiation between sentencing atrocity perpetrators and ordinary criminals (s.4.4.2). Judges at the Tribunal as well as academics raised these concerns. Given the gravity of the crimes it was alleged that the grant of provisional release signalled that the crimes being tried were considered "no more serious than any garden-variety domestic crime".[230] ICTY Judge Schomburg was similarly concerned at how the Tribunal practice of releasing the accused for court breaks could be interpreted. He noted that this "would in practical terms convey the impression, particularly to the people … of the former Yugoslavia that accused before the International Tribunal are let out on holidays".[231] This thesis questions the extent to which Judge Schomburg's concerns of perceived leniency[232] was repeated and caused people in the region to be frustrated as perpetrators were released early and unconditionally, which was not a short break from proceedings but an early ending of punishment.

4.5. The Unconditional Early Release of Perpetrators of Atrocity Crimes

This final section examines the relatively small yet pertinent body of scholarship, which has examined the judicial practice beyond sentencing perpetrators (relevant to UER) which this thesis complements. This literature has made in-roads into Kress and Sluiter's recommendation that international criminal justice's enforcement should form part of its overall legitimacy evaluation.[233] Much of this literature has concluded that a number of the legitimacy deficits at sentencing continued into the enforcement stage, and this thesis examines the extent to which these deficits existed when enforcement of sentences was concluded prematurely at UER. These criticisms included a deficiency in clear judicial reasoning (s.4.5.2 and s.4.5.3) and leniency towards perpetrators of atrocity crimes. Another criticism, one observer noted, was the President reading beyond the strict letter law in a grant of UER.

4.5.1. Judicial Overreach

In addition to favourable treatment of the accused, commentators have critiqued judges' treatment of perpetrators as they granted unconditional early release. Commentators challenged the

[230] C. Davidson 'No Shortcuts on Human Rights: Bail and the International Criminal Trial' (2010) *American University Law Review* 60(1): 1-70 at 13.
[231] C. Davidson, 'No Shortcuts on Human Rights: Bail and the International Criminal Trial' at 54.
[232] Judge Schomburg's statement also indicates that this judge was aware that the people in the region were a watchful audience, who he believed judges should consider as they exercised their powers over the accused.
[233] C. Kress and G. Sluiter, 'Enforcement: Preliminary Remarks', in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.) *The Rome Statute of International Criminal Court: A Commentary* (Oxford University Press, 2002) at 1753 cited in B. Holá and J. van Wijk 'Life after Conviction at International Criminal Tribunals' (2014) *Journal of International Criminal Justice* 12: 109 -132 at 110.

legitimacy of judges' exercise of power. Firstly, observers raised concern regarding judicial overreach, that is, judges going beyond their written powers and beyond the original intention of the Statute's drafters. Fittingly, the Tribunal's third President, Judge Jorda, expressed reservations at the power given to the Tribunal judges to "draft their own procedure ... in the sensitive area of criminal procedure"[234] whilst he had been critiqued for going "beyond a use of these powers that can be justified in traditional common law terms".[235] This concern was raised by his Presidential decision to grant an UER to a convicted perpetrator held in the UN Detention Unit (UNDU). Under the Statute and the RPE, perpetrators' eligibility for a pardon or commutation of sentence is triggered by their eligibility under the law of the enforcement state.[236] President Jorda, however, considered Kolundžija's direct application for a pardon, not an enforcement state.[237] Symons asserted that President Jorda effectively expanded the powers of the Tribunal by considering this direct application and further set the precedent for others to do so.[238]

4.5.2. Judicial Reasoning of UER Questioned

In addition to judicial overreach, scholars have critiqued the apparent lack in clearly developed judicial reasoning provided in the early release determinations. The ICTY's RPE guide the President, who is responsible for the "pardon or commutation of sentence,"[239] to consider four factors: gravity of the crime, similarly-situated prisoners, substantial cooperation with the prosecutor and a demonstration of rehabilitation.[240] Scholars examining the Presidents' practice of UER have largely critiqued the determinations for lacking rigour in the consideration of all four of these factors. Scholars, in their analysis of the decisions, asserted that the "vast majority of cases"[241] indicate (correctly up until February 2017) that the ""similarly-situated prisoners' [factor] has eclipsed the other three to become essentially dispositive".[242] Holá describes this two-thirds as the "magic-threshold"[243] – the use of the word "magic" suggests a sense of the President conjuring up a figure, a

[234] C. Jorda, 'The Major Hurdles and Accomplishments of the ICTY' (2004) *Journal of International Criminal Justice* 2: 572-584 at 574.
[235] L. Symons, 'The Inherent Powers of the ICTY and the ICTR' (2003) *International Criminal Law Review* 3: 369-404 at 404.
[236] Article 28 of the ICTY Statute.
[237] D. Kolundžija, Order of the President for the Early Release of Dragan Kolundžija, 5 December 2001.
[238] L. Symons, 'The Inherent Powers of the ICTY and the ICTR' at 402.
[239] Article 28 of the ICTY Statute.
[240] ICTY Rules and Procedure of Evidence.
[241] B. Holá, J. van Wijk, F. Constantini, and A. Korhonnen, 'Does Remorse Count? ICTY Convicts' Reflections on Their Crimes in Early Release Decisions' (2018) *International Criminal Justice Review* 28(4): 349-371 at 365.
[242] J. Choi, 'Early Release in International Criminal Law' (2014) *The Yale Law Journal* 123: 1783-1784.
[243] B. Holá, J. van Wijk, F. Constantini, and A. Korhonnen, 'Does Remorse Count? ICTY Convicts' Reflections on Their Crimes in Early Release Decisions' at 365.

subjective rather than an objective criterion.[244] The notion of the President practising too much discretion and doing so arbitrarily is summed up by Choi who asserted that "disregarding the other factors and rendering this [similarly-situated prisoners] one dispositive, the President frees herself to establish whatever standards she wishes, so long as she applies them consistently between prisoners".[245] Ironically, the principle of individualisation of punishment, which was the judicial reasoning provided by Tribunal judges for not establishing sentencing guidelines (noted s.4.4.2), appears to be reversed when the President considered the early termination of that same sentence. This has been noted by Orentlicher: "One striking exception to the ICTY's general reluctance to adhere to the principle of consistency in sentencing [is its] determinations about early release from prison [whereby] the ICTY President has often accorded substantial weight to the fact that early release has routinely been granted to other defendants".[246] This research's analysis of the early release decisions tested these specific scholarly criticisms and the criticisms were directly raised with a number of interviewees in The Hague.

The criticism that early release decisions were subjective rather than objective was implicitly noted by Choi as he highlighted Tribunal Presidents' instances of "double-counting" [247] guilty pleas. Choi critiqued the President in re-considering guilty pleas at early release, given that the plea had already been considered at sentencing, and generally contributed to a lower sentence.[248] The Tribunal's Presidents have considered a guilty plea either as evidence of remorse (thus evidence of rehabilitation) or cooperation with the Prosecutor[249] under the RPE.[250] The consideration of a guilty plea undertaken on any consistent basis but rather how the individual President wishes.[251] This decision echoes the critique of Galbraith (s.4.4.2) in relation to good deeds being considered on various bases, and inconsistently, as mitigating circumstances or evidence of good character in sentencing. Finally, the following section discusses the judges' assessments of rehabilitation as another aspect of judicial reasoning discussed in the literature. Further, a perpetrator's demonstration of rehabilitation is a factor the President is required to consider as he decides an

[244] Although Holá and van Wijk recognise that the 2/3 threshold appears to represent the median figure of when prisoners in the European enforcement states are eligible for release on parole or probation, or conditional release. See: Holá B and van Wijk J, 'Life after Conviction at International Criminal Tribunals' (2014) *Journal of International Criminal Justice* 12: 109-132 at 122.
[245] J. Choi, 'Early Release in International Criminal Law' at 1797.
[246] D. Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (Open Society Justice Institutive and ICTJ, 2010) at 56.
[247] J. Choi, 'Early Release in International Criminal Law' at 1814.
[248] J. Choi, 'Early Release in International Criminal Law' at 1798.
[249] J. Choi, 'Early Release in International Criminal Law' at 1784.
[250] Rule 125, two of the four factors the President is required to consider as the perpetrator applies for a pardon or commutation of sentence is 'evidence of their demonstration of rehabilitation' and 'substantial cooperation with the Prosecutor'.
[251] See Chapter 5.

early release application, and as Chapter 6 discusses, their assessment of rehabilitation is a significant and controversial factor in shaping the legitimacy assessment of the UER practice.

4.5.3. Judicial Assessments of Rehabilitation

Scholars have also questioned the judicial consideration and explanation of perpetrators' demonstration of rehabilitation: firstly, the apparent benefit of the doubt accorded to evidence of rehabilitation, and, secondly, whether this was an appropriate measure for perpetrators of atrocity crimes.

Many scholars have expressed disappointment at the apparent benefit of the doubt accorded to perpetrators as the Presidents consider the evidence of the perpetrators themselves, their counsel or the enforcement state has provided of their rehabilitation.[252] Holá and colleagues have systematically analysed the decisions. Although they recognise that it is not the responsibility of the Tribunal to rehabilitate perpetrators,[253] they note their disappointment that the judges have failed to assess it systematically.[254] They found that submissions on rehabilitation "are often conflicting or unsubstantiated", and critique the President for an apparent lack of follow up.[255] They concluded that "evaluation of prisoners' reflections on their crimes and its relevance for assessment of rehabilitation by the President seems to be rather matter-of-factly, superficial, and sweeping".[256]

The second critique, based on the understanding that atrocity crimes occur in a different context and high-and-mid level perpetrators are often of a different nature to ordinary criminals.[257] It is argued that high and mid-level perpetrators, rather than being generally deviant, constitute a "different kind of perpetrator [who] commits crimes in abnormal and extraordinary circumstances".[258] However, some low-level perpetrators may be motivated by personal revenge or

[252] See Chapter 6.
[253] R. Mulgrew, *Towards the Development of the International Penal System* (2014, Cambridge University Press) who undertook empirical study on perpetrators' life in prison, has advocated for an international penal system whereby perpetrators of atrocity crimes could receive tailored treatment rather than be dispersed throughout Europe.
[254] B. Holá, J. van Wijk, F. Constantini, and A. Korhonnen, 'Does Remorse Count? ICTY Convicts' Reflections on Their Crimes in Early Release Decisions' at 365.
[255] B. Holá, J. van Wijk, F. Constantini, and A. Korhonnen, 'Does Remorse Count? ICTY Convicts' Reflections on Their Crimes in Early Release Decisions' at 363.
[256] B. Holá, J. van Wijk, F. Constantini, and A. Korhonnen, 'Does Remorse Count? ICTY Convicts' Reflections on Their Crimes in Early Release Decisions' at 365.
[257] See Chapter 6, s.6.6.
[258] J.M. Kelder, B. Holá and J. van Wijk, 'Rehabilitation and Early Release of Perpetrators of International Crimes: A Case Study of the ICTY and ICTR' (2014) *International Criminal Law Review* 14: 1177-1203 at 1197.

a violent tendency,[259] but the overarching fact remains that these crimes were committed in a context. With this context in mind, the Tribunal Presidents' understanding of good behaviour in prison as being an indicator of the extent to which a perpetrator has demonstrated evidence of rehabilitation is described by Merrylees as "superficial".[260] He points to Kelder, Holá and van Wijk's example of Obrenović, whom the President considered as demonstrating signs of rehabilitation given that he served as a kitchen attendant. They query the suitability of this measure, and highlight that the President himself did not provide an explanation. They note: "how Obrenović fulfilling of obligations in the kitchen actually assists in rehabilitating this former military officer convicted of persecuting hundreds of civilians remains unclear".[261] Holá and colleagues advocated that acknowledgment and remorse should be emphasised for rehabilitating atrocity criminals, as the crimes are perpetrated based on ethnic-hatred or within this context.[262] They have further critiqued the Tribunal's failure to consistently consider "whether or not they deny their past deeds or acknowledge the wrongfulness of their actions" [263] and factor this into the demonstration of rehabilitation. They have asserted that it is these factors, which the Tribunal President should consider for perpetrators who are released early and "often return to deeply divided societies".[264] This thesis contributes to, and complements, this research as it further interrogates many of their assertions, through an analysis of the decisions and through interviews with stakeholders at the Tribunal itself, and perspectives gained from stakeholders in BiH (one of the societies to which Holá and colleagues refer).

This more nuanced approach to understanding rehabilitation for perpetrators of atrocity crimes, their context and their communities speaks to the theme running throughout the literature – which is the challenge of punishing for the most heinous crimes – both for the perpetrator themselves but also for the society (s.4.3). This criticism is particularly relevant when it comes to ending the punishment already criticised for being "surprisingly low".[265] Merrylees supported Choi's criticism that on reading the decisions the "gravity of the crime" consideration appears to be simply a tick-box

[259] The Tribunal judges noted for example in the case of Jelisić he had a disturbed personality and his crimes had been opportunistic. See The *Prosecutor v. Goran Jelisić*, 14 December 1999, para. 105.
[260] A. Merrylees, 'Two-thirds and You're Out? The Practice of Early Release at the ICTY and the ICC, in Light of the Goals of International Criminal Justice' (2016) *Amsterdam Law Forum* 8(2): 69-76.
[261] J.M. Kelder, B. Holá and J. van Wijk, 'Rehabilitation and Early Release of Perpetrators of International Crimes: A Case Study of the ICTY and ICTR' at 1193.
[262] B. Holá, J. van Wijk, F. Constantini, and A. Korhonnen, 'Does Remorse Count? ICTY Convicts' Reflections on Their Crimes in Early Release Decisions' at 365.
[263] B. Holá, J. van Wijk, F. Constantini, and A. Korhonnen, 'Does Remorse Count? ICTY Convicts' Reflections on Their Crimes in Early Release Decisions' at 365-366.
[264] M. Kelder, B. Holá and J. van Wijk, 'Rehabilitation and Early Release of Perpetrators of International Crimes: A Case Study of the ICTY and ICTR' at 1199.
[265] J.D Ohlin, 'Proportional Sentences at the ICTY', 322-341.

and asserted that "there is something particularly inflammatory about releasing early an individual convicted for some of the most heinous crimes in human history, without any real remorse or changed circumstances".[266] Choi argued that the practice, whereby perpetrators of atrocity crimes are considered for release along the same timeframe as ordinary criminals (indeed more favourably given that their early release is unconditional), lacks legitimacy and points to the disquiet that a number of early released perpetrators caused upon their return and concluded that "victims see the presumption [of early release] as reflecting a lack of seriousness on the part of the tribunal [and therefore] hurts the credibility of international criminal justice as a whole". [267] This assertion is examined in the thesis' findings.

4.5.4. The Tribunal's Non-Engagement with Regional Stakeholders as they Grant UER

Other scholars have more recently[268] addressed the Tribunal's grant of UER. Trbovc asserted that celebratory homecomings of convicted perpetrators should be "viewed as a litmus test for the success/failure of the ICTY in changing values and conflicting historical interpretations … about what happened during the Yugoslav wars". Nevertheless, Trbovc and others have been less critical of UER and their analysis has focused on the significance of unrepentant perpetrators' return for the region. Unlike Holá et al, Choi and others they have not accorded the controversy to the Tribunal itself nor drawn any implication of the return being early and unconditional.[269] Their critique focuses on the ethnically-divided, politically driven media outlets of the region.[270] The special edition of the International Criminal Justice Review highlighted the celebrations many high-level (political and military elites) received as they return to the region.[271] Karstedt's article drew on a comparative analysis of Nuremberg and the ICTY perpetrators' return to post-conflict society. Similarly to Holá et al and Choi she emphasised that perpetrators of atrocity crimes differ from ordinary criminals and asserted that "re-entry pathways [are] shaped by the nature of the conflict as well as by the political and social conditions of the society".[272] She recommended that society as well as the perpetrators should be considered in perpetrators' release. In contrast to Holá et al she did not believe that the

[266] A. Merrylees, 'Two-thirds and You're Out? The Practice of Early Release at the ICTY and the ICC, in Light of the Goals of International Criminal Justice' at 73.
[267] J. Choi, 'Early Release in International Criminal Law' at 1824-1825.
[268] December 2018 – post fieldwork in BiH (September – December 2017).
[269] J.M. Trbovc, 'Homecomings From "The Hague": Media Coverage of ICTY Defendants After Trial and Punishment' (2018) *International Criminal Justice Review:* 28(4): 406-422 at 408.
[270] K. Ristić, 'The Media Negotiations of War Criminals and Their Memoirs: The Emergence of the "ICTY Celebrity"' (2018) *International Criminal Justice Review:* 28(4): 391-405.
[271] December 2018: 'Special Issue: ICTY Celebrities: War Criminals Coming Home' (2018) *International Criminal Justice Review:* 28(4).
[272] S. Karstedt, 'I Would Prefer to Be Famous": Comparative Perspectives on the reentry of War Criminals Sentenced at Nuremberg and The Hague' (2018) *International Criminal Justice Review:* 28(4): 372-390 at 374.

ICTY of the 2000s had "the type of oversight and vigilance that the Allies"[273] had post Second World War, and did not make any assessments of the ICTY's legitimacy. Nevertheless, she recommended that future ICTs "might become more proactive in monitoring return … and see it as part of their task".[274] This could, she argued, encompass the imposition of "conditions of release",[275] although she does not specify what these conditions may be.

The scholars in this review all noted the significance of the unrepentant perpetrators' return, firstly for impact on the reinforcement of relativisation of the crimes,[276] the "promotion of particular historical narrative".[277] Their celebratory returns denoted that for the perpetrators' supporters the issue of guilt or innocence determined by the ICTY is "largely irrelevant".[278] These assertions were spoken to in this research's findings, discussed in Chapter 7.

Others have highlighted that the other side in post-conflict society is also important here. Ristić has emphasised that victims have been belittled through the homecomings of the unrepentant and celebrated perpetrators. Ristić in her examination of perpetrators' autobiographies outlined how they had denounced their victims,[279] which was reaffirmed as they received heroes' welcomes. Plavšić argued that rape victims, whose testimonies had been accepted by the Tribunal, were "staging testimonies for camera".[280] Karstedt shared this view as she argued that "victims [were] often blamed or seen again as enemies"[281] in this discourse. However, as noted, these scholars do not attribute their assessments of the sociological legitimacy of the Tribunal to the Tribunal itself. They focus on the regional and national political and media elites in shaping the perceptions of the Tribunal. Karstedt urged nevertheless that future ICTs draw lessons from these homecomings. She proposed that institutions of international criminal justice could prepare and "support … victims'

[273] S. Karstedt, 'I Would Prefer to Be Famous": Comparative Perspectives on the reentry of War Criminals Sentenced at Nuremberg and The Hague' at 384.
[274] S. Karstedt, 'I Would Prefer to Be Famous": Comparative Perspectives on the reentry of War Criminals Sentenced at Nuremberg and The Hague' at 384.
[275] S. Karstedt, 'I Would Prefer to Be Famous": Comparative Perspectives on the reentry of War Criminals Sentenced at Nuremberg and The Hague' at 384.
[276] K. Ristić, 'The Media Negotiations of War Criminals and Their Memoirs: The Emergence of the "ICTY Celebrity"'– noting that Plavšić whilst acknowledging ethnic cleansing downplayed and justified it as a process of "natural process of ethnic homogenization" at 396.
[277] J.M. Trbovc, 'Homecomings From "The Hague": Media Coverage of ICTY Defendants After Trial and Punishment' at 413.
[278] J.M. Trbovc, 'Homecomings From "The Hague": Media Coverage of ICTY Defendants After Trial and Punishment' at 412.
[279] K. Ristić, 'The Media Negotiations of War Criminals and Their Memoirs: The Emergence of the "ICTY Celebrity"' at 396.
[280] K. Ristić, 'The Media Negotiations of War Criminals and Their Memoirs: The Emergence of the "ICTY Celebrity"' at 396.
[281] S. Karstedt, 'I Would Prefer to Be Famous": Comparative Perspectives on the reentry of War Criminals Sentenced at Nuremberg and The Hague' at 384.

communities when perpetrators are released back home".[282] This recommendation was echoed, although more fervently, by interviewees in BiH, discussed Chapters 7 and 8.

4.6. Conclusion

This chapter has outlined the most pertinent areas of literature on the Tribunal's legitimacy of exercise (or its performance legitimacy)[283] which linked to this thesis' focus on UER. It began, however, by noting that the unique characteristics of the Tribunal, as argued in the scholarship and as this thesis also shows, has influenced the Tribunal's exercise of power. It would be remiss not to recognise the Tribunal's other stakeholders, the more nebulous international community who enabled it to function, and who are also an audience.[284] However, for the purposes of this thesis, a key stakeholder of the Tribunal are those whose lives it directly affects - stakeholders in the region, to whom the Tribunal articulated they were bringing justice.[285] Thus, literature analysing the Tribunal's sociological legitimacy (perceptions of these stakeholders) in the region has been examined here (s.4.3). Chapters 6, 7 and 8 demonstrate that many of the practices which caused a lack of sociological legitimacy, primarily its oversight of victims and lack of outreach, reappear at the grant of UER.

The chapter also examined the Tribunal judges' exercise of power from its normative perspectives; primarily plea-bargaining and sentencing determinations. These judicial actions are pertinent as UER effectively "chops-off"[286] one–third of the declared sentence. This sentence is already controversial, widely considered as unduly lenient and unclearly reasoned. The practice of plea bargaining, initially rejected by the Tribunal, was contested by scholars as being at odds with the Tribunal's rhetoric; furthermore, it was an unknown to the FRY and often resulted in lower sentences. Finally, scholarly criticism of the Tribunal's Presidents' grant of UER was set out (detailed further in Chapters 5 and 6) primarily again for a lack of clear reasoning. Before turning to these findings of repeated patterns of sociological legitimacy deficits - the perceptions of this practice, by stakeholders in The Hague and in

[282] S. Karstedt, 'I Would Prefer to Be Famous": Comparative Perspectives on the reentry of War Criminals Sentenced at Nuremberg and The Hague' at 384.
[283] See Chapter 3, s.3.4.3.
[284] M. Swart, 'Tadić Revisited: Some Critical Comments on the Legacy and the Legitimacy of the ICTY' (2011) *Goettingen Journal of International Law* 3(3): 985-1009 at 991. Acknowledging the reality of these multiple stakeholders is important, not only as they have influenced the operationalisation of the ICTY but because they are also likely to influence any future ICTs and the ICC. See J.N. Clark, 'International Criminal Courts and Normative Legitimacy' (2015) *International Criminal Law Review* 25(4): 763-783 at 763.
[285] T. Meron, 'Procedural Evolution in the ICTY' (2004) *Journal of International Criminal Justice* 2: 520-525 – 'While the work of the ICTY has been aimed principally at the people of the former Yugoslavia, it has had a broader significance as well' at 520.
[286] A. Merrylees, 'Two-thirds and You're Out? The Practice of Early Release at the ICTY and the ICC, in Light of the Goals of International Criminal Justice' (2016) *Amsterdam Law Forum* 8(2): 69-76 at 71.

BiH (Chapters 6, 7 and 8), the following chapter addresses the law on early release, the practice itself and patterns in the early release decisions.

Chapter 5: The ICTY and its Residual Mechanism Practice of Unconditional Early Release

5.1. Introduction

This chapter argues that UER lacked normative legitimacy, principally legality, and had a sociological legitimacy deficit.[1] The chapter begins by looking briefly at the black letter law of the Statute and an examination of the *travaux préparatoires* which indicates the original intention of the Statute's provision on pardon or commutation of sentence (s.5.2). This is followed with analysis of early release decisions (empirical legal analysis) and interview data which conclude that UER was intended to be an exception (s.5.2) but became the standard (s.5.3).[2] This was primarily due to the Tribunal's Presidents exercise of broad discretion (s.5.3.1-s.5.3.3). The analysis indicates that Presidents' capacity to use broad discretion resulted in them adopting a *stare decisis*[3] approach (s.5.3.4) which included their refusal to consider additional negative factors as requested by the Prosecutor (s.5.4.1). This exhibited a pattern whereby the Presidents' read the law in favour of the perpetrator (s.5.4.2) which effectively downplayed the gravity of their crime. On occasion, Presidents used their broad discretion to consider factors already counted in favour of the perpetrator, including the guilty plea (s.5.4.3).

Generosity to the perpetrator is a pattern exhibited in the Presidents' consideration of their rehabilitation which, given the perceived illegitimacy of their stated understanding of rehabilitation, warranted attention in its own right (Chapter 6). As the practice was on-going during the writing of the thesis, the chapter notes the developments at the Tribunal which may ameliorate the perceived illegitimacy of this practice - its unconditional nature. These conditions (prohibition from speaking with the media and political activities for example) may potentially make the practice legitimate as it is more in line with what many interviewees in BiH perceived as the most frustrating element of release – its unconditional nature. The chapter also notes the latest developments, whereby the President has rejected UER outright, a further demonstration of Presidents' discretion (s.5.4.7). These developments, in particular conditional release (s.5.4.6 and s.5.4.8), reiterate the broad discretion of the Presidents, as they adopted a different approach. Further, the chapter begins to

[1] In the language of legitimacy, the chapter begins with the examination of the normative legitimacy of UER, the legal basis, and subsequently the belief in the practice's legitimacy - that is, its sociological legitimacy.

[2] D. Beetham, *The Legitimation of Power* (Oxford University Press, 1991) at 16. The second pillar by which Beetham asserted that a power is legitimate is where the rules are practiced in accordance with shared beliefs of the power-holder and the subordinates. D. Beetham, *The Legitimation of Power*, at 17.

[3] The Presidents, until February 2018, predominantly followed the precedent of granting UER when the perpetrator had served two-thirds of their sentence. This was in spite of the fact that under the Statute and more generally judges' ruling on international law are not required to follow precedent: see G. Guillaume, 'The Use of Precedent by International Judges and Arbitrators' (2011) *Journal of International Dispute Settlement* 2(1): 5–23.

answer how selected stakeholders perceived the normative (legal) legitimacy of this practice (s.5.5). Chapters 6, 7 and 8 discuss the sociological legitimacy of the normative (moral) elements of the practice and its repercussions for these stakeholders in the region.

This analysis of the practice's normative (legal) and sociological legitimacy is important as "it is crucial to acknowledge and learn … to develop better practice, and not just reinvent a broken wheel".[4] To develop better practice, the interview analysis discusses aspects of the practice that the majority of the stakeholders interviewed perceived as illegitimate, and why these perceptions were held. Thus, based on interviewee feedback relating to the factors the President is required to consider, the chapter concludes by proposing ways in which some specific actions can be undertaken at the Residual Mechanism to lessen the practice's negative impact, and recommends actions for any future *ad hoc* tribunals where early release is an option for perpetrators of atrocity crimes (s.5.6).[5]

5.2. Normative Legitimacy: The Legal Basis for a Pardon or Commutation of Sentence - subsequently Early Release

5.2.1. The Statute

From its inception, the ICTY set out the possibility of perpetrators not serving their full sentence. The first half of Article 28 of the Statute provides that:

> *If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal accordingly.* [6]

Nemitz interpreted Article 28 to mean that perpetrators early release was foreseen as a general practice. Nemitz boldly asserted "it is quite obvious that the drafters of the Statute did not have in mind the possibility that a convicted person would serve the entire term of imprisonment".[7] However, a close inspection of the *travaux préparatoires*, and affirmed in the interviews, counters Nemitz's assumption and this chapter demonstrates that early release was foreseen as an exception not a general practice.

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[4] T. Ward and S. Maruna, *Rehabilitation: Beyond the risk paradigm* (Routledge, 2007) at 7.

[5] Second public redacted version of "Observations of the Defence for Mr Lubanga on a reduction in sentence, referenced ICC-01/04-01/06-3151-Conf-Exp, of 14 July 2015, under 'Applicable Law', para.10 – "Although convicted perpetrators are not automatically released after two-thirds of their sentence, this factor is considered preponderant when examining an application for early release – citing Jokić, Early Release Decision dated 1 September 2008, para.16.

[6] Article 28 of the ICTY Statute, 25 May 1993.

[7] J.C. Nemitz, 'The Execution of Sanctions Imposed by Supranational Criminal Tribunals' in R. Haveman and O. Olusanya (eds.) *Sentencing and Sanctioning in Supranational Criminal Law* (Intersentia, 2006) at 125.

5.2.2. The *Travaux Préparatoires*

In legal considerations and discussions at the United Nations Security Council where the possibility of early release from imprisonment was raised, the gravity of the crimes and their uniqueness were emphasised and not all legal experts even considered the possibility of pardon or commutation of sentence appropriate.[8] Further, this section will show, that UER was operationalised in a manner which ran counter to these original proposals.

The Statute was written speedily by the UN Secretary-General's legal staff at the Secretariat and adopted without amendments by the UN Security Council, May 1993.[9] In relation to sentence enforcement, it was noted that the details of how this was to happen were left until a later date, as priority was given to establishing procedures for indicting alleged perpetrators and establishing a fair trial process.[10] Nevertheless, prior to the ICTY's establishment, preparations were made by legal experts on its overall operationalisation (including enforcement of sentences). These documents would have been available to the drafters of the Statute, the judges, as they detailed the Rules and Procedure of Evidence (RPE) and the President himself, as he decided on perpetrators' application for early release. A French committee of jurists undertook one such study.[11] Their report included the provision for a "pardon or remission" of sentence. Choi highlighted this study and convincingly argued that, on the plain reading of the *travaux préparatoires,* a pardon or commutation of sentence was proposed as clemency. A grant of clemency in national law is an exceptional occurrence, not a routine practice. He cited the French version of the Statute, Article 28, which sets out "*grâce et commutation de peine"*, which, according to the French reading of criminal law, is the unconditional, unsupervised release granted at the discretion of the executive.[12]

There are two important differences between the original intention and actual practice discernible on close reading of the French jurists' report. First, the report recommended that the enforcement state, with the oversight of the UNSC, not the Tribunal, should have the responsibility for

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[8] V. Morris and D. Scharf, *Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis, Volume 1 & 2*, at 306-09, referenced in W. Schabas, 'Sentencing by International Tribunals: A Human Rights Approach' (1997) *Duke Journal of Comparative and International Law* 7(2): 461-518 at 511.

[9] M.J. Matheson and D. Scheffer, '*The Creation of the Tribunals*' (2016) *The American Journal of International Law* 110(2): 173 - 190 at 176.

[10] R. Zacklin, 'Some Major Problems in the Drafting the ICTY Statute' (2004) *Journal of International Criminal Justice* 2(2): 361-367.

[11] Letter Dated 10 February 1993 from the Permanent Representative of France to the United Nations Addressed to the Secretary-General, UN Doc S/25266, para. 157. This commission submitted its recommendations to the UN Secretary General (UNSG) and Permanent Members of the Security Council (UNSC).

[12] J. Choi, 'Early Release in International Criminal Law' (2014) *The Yale Law Journal* 123: 1784-1828 at 1798.

determining a grant of pardon or remission of sentence for the convicted person. Second, this grant would be on the basis of "human and political"[13] considerations. The proposition that enforcement states (overseen by the UNSC) take responsibility for this decision was based on the belief that the Tribunal itself would be an inappropriate body to grant a pardon or sentence remission for two reasons. First, given that it was the sentencing body it would "confuse its functions". Second, it would unduly prolong the lifetime of the Tribunal.[14] The second reason for the deciders of a grant of pardon or sentence remission being a combination of the enforcement state and the UNSC, was that perpetrators were detained in enforcement states' prison system, under their rules. The report recommended that factors such as "illness, remorse" would be important, and could be determined by the enforcement state, given its proximity to the perpetrator, and would, therefore, be aware of the "real personal situation of that individual".[15] This reference to "human" suggests considerations based on the individual characteristics of the perpetrator, their ill-health and/or their personal reformed character. In the first instance, the enforcement state decision based on the perpetrator's personal circumstances, would trigger the pardon or sentence remission.

The proposals recognise the unique nature of the perpetrator and the possible implications of their release from imprisonment. Unlike ordinary perpetrators, a sovereign state could not grant a pardon or remission of sentence – a higher authority was necessary. The UNSC must approve the early release. The report noted that the "Security Council [would be] in a better position to take into account the political risks and advantages of a grant of pardon or a remission of the sentence".[16] The report suggests that repercussions were perceived as a possibility when a sentence was prematurely terminated; such as political instability in the region to which the early released perpetrator may return to, or, indeed, that the returning perpetrator may create. Therefore, as the UNSC is principally responsible for "maintain[ing] international peace and security" this oversight role was proposed. That the perpetrators' release be considered for political risks further made sense, given that one of the Tribunal's objectives was to contribute to the "restoration and maintenance of peace".[17] That the decision required approval of the UNSC suggests that a perpetrator's pardon or remission of sentence was not envisaged to be a matter of routine. These details support Choi's proposition that the Statute drafters had envisaged a pardon or reduction of sentence to be an

[13] Letter Dated 10 February 1993 from the Permanent Representative of France to the United Nations addressed to the Secretary-General, UN Doc S/25266, para. 157
[14] Letter Dated 10 February 1993 from the Permanent Representative of France to the United Nations addressed to the Secretary-General, UN Doc S/25266, para. 158.
[15] UN Doc S/25266, para. 157.
[16] UN Doc S/25266, paras. 157-158 – referenced in J. Choi, 'Early Release in International Criminal Law' at 1799.
[17] UNSC Resolution 808, 22 February 1993 – emphasis added.

exceptional measure, based on unique circumstances of the individual which would be balanced against the political climate.

Three months later, however, the drafters of the Statute had effectively rejected this recommendation and placed the responsibility with the ICTY itself. The President (in consultation with the judges) would be the authority to determine a grant of pardon or commutation of sentence, not the UNSC. Furthermore, it provided the President with broad discretion to consider matters beyond the perpetrator themselves and the political climate.

Article 28 of the Statute, adopted 23 May 1993, reads broadly:

> *If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal accordingly. The President of the International Tribunal, in consultation with the judges, shall decide the matter on the basis of the interests of justice and the general principles of law.* [18]

There are three important[19] points to note here, concerning the divergence from the French jurists' proposals and the original intention of the drafters with the subsequent practice. Firstly, the Statute provided a "pardon or commutation of sentence", not an UER, (s.5.2.2). Secondly, the decision was to be determined ultimately by the President in consultation with "the judges" of the Tribunal. These judges were not identified, but the wording of Article 28 implies that all the judges of the Tribunal should be consulted, not a selected few which was the practice adopted. This was confirmed in one interview (s.5.3). Thirdly, the wide scope of discretion was laid out as the President was to base the decision on the "interests of justice" and "general principles of law"; these are "nebulous concepts"[20] open to wide interpretation which meant the President could effectively decide at his own discretion. All of these matters fundamentally handed over "enormous discretion"[21] to the President.

[18] Article 28 of the ICTY Statute, 25 May 1993.
[19] Another point of divergence is that the enforcement state has less power than originally conceived; the state would notify the ICTY of the convicted person's *eligibility* under their law, it would not decide the matter but rather defer the decision to the Tribunal directly.
[20] A.M. Danner, 'Enhancing the legitimacy and accountability of prosecutorial discretion at the international criminal court' (2003) *American Journal of International Law* 97(3): 510-552 at 543. See Chapter 3, s.3.4.3.
[21] W. Schabas, 'Sentencing by International Tribunals: A Human Rights Approach' (1997) *Duke Journal of Comparative and International Law* 7(2): 461-518 at 512.

5.2.3. The Law in Practice

Five years after the original proposals were made by the French, subsequently altered by the Statute's drafters, practicalities had given rise to a different approach being taken. The Statute noted that the decision would be determined by the President "in consultation with the judges".[22] As the ICTY judges developed their own Rules of Procedure and Evidence (RPE)[23] the Tribunal's Yearbook noted that this Presidential decision on the grant of pardon or commutation of sentence was deemed an administrative one, which required "Administrative action" rather than "Legislative Action".[24] This administrative designation narrowed the decision-making process; rather than being discussed in a plenary of judges (the 11 elected judges), it would be discussed by the Bureau. This Bureau was a five-person body: the President, the Vice-President and the Presiding Judges of the Trial Chambers. As outlined later, the early release decision, being determined by judges at the ICTY rather than diplomats at the UNSC, was one reason why the political considerations, or "risks", as described by the French jurists, were rarely, at least on paper, taken into consideration. Further, the RPE, developed by a Rules Committee[25] (appointed by the President) set out which other factors (not including political risks) should be considered in determining a pardon or commutation of sentence. As the Statute drafters shifted decision-making from the UNSC (a body of 15 Member States) to the Tribunal, so too did the Rules Committee shift decision-making to five judges of the Bureau, rather than 11 plenary judges.

The trigger for a pardon or commutation of sentence was the perpetrator's eligibility under the jurisdiction in which they were serving their sentence. In contrast to the French proposal, the enforcement state would notify the Tribunal of the convicted persons' eligibility only. Perpetrators convicted by the Tribunal were to serve their sentences in European States who were willing to enforce the sentences.[26] The Tribunal approached states directly, and entered into bilateral agreements. The agreements tended to follow a template: the majority of agreements have a provision for the "pardon or commutation of sentence" and, either separately or in a combined

[22] Article 28 of the ICTY Statute, 25 May 1993.
[23] Article 15 of the ICTY Statute stipulated that "the judges would adopt Rules of Procedure and Evidence for the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters".
[24] Note from the President: Statute's provisions requiring national action', IT/11/Rev.1. 29 November 1994, in ICTY Yearbook 1994 at 152.
[25] In December 1997, the President of the Tribunal established a working group ("the Rules Committee") see: Annual Report, 1998, para.107. The Rule Committee was "composed of Tribunal judges as voting members, with the Office of the Prosecutor, the Registrar and a representative of the Association of Defence Counsel as non-voting members", Annual Report 2016, "The Rules Committee", para. 48.
[26] Any European State could enforce the sentence other than the Netherlands and FRY. Article 27 of the Statute and Note dated 4 October 1994 from the UNSG to Member States which invited them to indicate whether they were willing to enforce prison sentences pursuant to Article 27, Note from the President: Statute's provisions requiring 'national action', IT/11/Rev.1. 29 November 1994, in ICTY Yearbook 1994, at 153.

provision, "early release".[27] The wording of these country agreements supports Choi's view that the Tribunal applied a "misguided modelling of international early release after domestic parole".[28] The enforcement agreement with Norway (1998), where the first perpetrator serving a sentence was released, contained an article dedicated to a "pardon or commutation" of sentence, but under the article on "enforcement of sentence" the phrase "eligible for early release" was used.[29]

This wording was later utilised in the Tribunal's 1999 "Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the International Tribunal", which put early release on an equal pegging with the Statute's provision for a "pardon or commutation of sentence".[30] The use of "early release" has mutated into a practice which went beyond what was originally conceived of by the Statute drafters, and beyond what the judges handing down the sentences had foreseen. This was noted by one interviewee in The Hague who argued that, at least in the first few years, "I don't think judges ever contemplated when they gave fixed term sentences that they would be getting two-thirds credit just as *standard".*[31] Fundamentally, the above has shown that UER's legality is problematic, given that the Rules and Practice Direction developed out of sync with the Statute. This set the path for the subsequent practice to be further out-of-line with the Rules (5.3).

5.3. The Written Decisions: Unconditional Early Release: From the Exception to the Standard

5.3.1. The Rules and the Practice Develop

A chronological examination of the written decisions supports Choi's assertion that originally early release was foreseen as an exception, but later became the "two-thirds standard",[32] as stated by the interviewee above. Analysis of the determinations reveals how this shift from the exception to everyday practice occurred. First, by judges applying the *stare decisis* principle; second, providing perpetrators with a generous benefit of the doubt, and third, being focused on the perpetrators, thus overlooking the originally envisaged "political risks".[33] These practices (*stare decisis*, providing

[27] 'Early Release' is noted, in addition to 'pardon or commutation', in the bilateral agreements with Belgium, Denmark, Finland, Norway, Poland, Spain, Sweden and the UK.
[28] J. Choi, 'Early Release in International Criminal Law', at 1788.
[29] Agreement between the Government of Norway and the United Nations on the Enforcement of Sentence of the International Criminal Tribunal for the Former Yugoslavia, 24 April 1998.
[30] Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the International Tribunal, April 1999.
[31] Interview, Senior Staff Member, The Hague, 24/01/2017, their emphasis.
[32] J. Choi, 'Early Release in International Criminal Law', at 1788.
[33] Committee of French Jurists set up by Mr Roland Dumas, Minister of State and Minister for Foreign Affairs, to study the establishment of an International Criminal Tribunal to judge the crimes committed in the former Yugoslavia, attached to

perpetrators with the benefit of the doubt and overlooking factors not related to the perpetrators) indicate that Presidents tended to favour the perpetrator. This tendency is both an explanatory factor in the grant of UER and an outcome. Presidents' tendency and resulting approach was problematic: firstly, it neglected to take into account the nature of the perpetrators and their crimes; secondly, it gave a more generous approach to these perpetrators than ordinary criminals (overlooking the gravity of the crimes), and thirdly, it neglected to consider (as per recommendations of international experts) implications of UER for the community, including war-affected people of the former Yugoslavia (FRY), and, primarily, victims and their communities.

In addition to the Statute, Presidents' determinations of a pardon or commutation of sentence was to be guided by the RPE which provide them with four factors that they must consider, within the framing of the general principles of law and interests of justice, set out as follows in Rule 125:

> *In determining whether pardon or commutation is appropriate, the President shall take into account, inter alia, the* ***gravity of the crime or crimes for which the prisoner was convicted****, the* ***treatment of similarly-situated prisoners****, the prisoner's* ***demonstration of rehabilitation****, as well as any* ***substantial cooperation of the prisoner*** *with the Prosecutor.*

These factors and the Presidents' consideration of them are discussed throughout this analysis. Prior to this, examined below is the practice which, based on close analysis, reveals patterns which identify why the practice evolved as it did.

5.3.2. The Sentence

The initial decisions, despite being brief, suggest that Presidents initially considered early release as a departure from the intended outcome of sentencing. In some of the initial decisions, Presidents Jorda and Meron noted the dates when the perpetrators should have served their sentences in full. President Jorda noted in his second decision that "pursuant to Rule 101(C) … and the above Judgement … provide … that, save in exceptional circumstances, Dragan Kolundžija must serve his sentence until 6 June 2002".[34] These two references to the Rules and the Judgment are telling, because Rule 101(C) makes no reference to any exceptional circumstances being required, it simply reads that "credit shall be given … for the period … during which the convicted person was detained … pending surrender … or pending trial or appeal".[35] President Jorda, citing both the Rules and the Judgment decision, implied that he considered that the judges sentencing (noting that Kolundžija's

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the Letter dated 10 February 1993 from the Permanent Representative of France to the UN addressed to the Secretary General, UN Doc S/25266, at 41, para. 158.

[34] D. Kolundžija, Early Release Decision, 5 December 2001.

[35] D. Kolundžija, Early Release Decision, 5 December 2001.

time in detention to date would count as part of the time served) intended for the sentence to be served in full. Despite this recognition, the President provided no exceptional circumstances, but granted Kolundžija release prior to serving his full sentence.

The notion that early release should not be presumed as a given was articulated by the Appeals Chamber, in the case of Dragan Nikolić. The Appeals Chamber reduced the sentence by three years, and justified the reduction on the basis that the Trial Chamber judges had erred in sentencing because they had, "attached too much weight to the possibility of early release".[36] Four months after the Dragan Nikolić Appeal Judgment, President Meron granted unconditional early release to Todorović. In his decision, the President referenced both the length of the full sentence and two-thirds of that sentence, an indication that the full length was being actively considered. In contrast to President Jorda's decision to grant early release to Kolundžija (without noting any exceptional circumstances) President Meron asserted that an exceptional circumstance existed for Todorović. This exceptional circumstance was Todorović's indicated willingness to testify in pending cases.[37]

However, as this chapter demonstrates, there are inconsistencies in the decisions, not only between the five Presidents, but within decisions of the same President. This is first noted in President Meron's determinations. In his grant of release to Todorović, he recognised the need for exceptional circumstances to exist,[38] but less than one month later, he neglected to indicate any such need to warrant the grant of early release to Mucić.[39] The case of Mucić's early release is significant for three main reasons: first, the requirement for exceptional circumstances to exist being abandoned; second, the beginning of dominance being accorded to the "similarly-situated prisoners" provision and the President's reading of "similarly-situated"; and third, the failure to recognise that early release in national legal systems was generally conditional.

Firstly, it set the written precedent that, at least on the written record, no exceptional circumstances were required for the grant of early release. Secondly, it marked the emergence of priority being

[36] President Meron was the President at this time and indeed the judges of the Trial Chamber had requested the Max Planck Institute to produce a report on both the sentences and pardon/commutation of sentence options available for perpetrators of atrocity crimes, or where the country had no laws on atrocity crimes, then the nearest possible crimes, including murder by prolonged beating, multiple rape and torture. In a small irony, Dragan Nikolić was granted early release after two-thirds of his sentence by President Meron in 2015. After serving two-thirds of the Appeals Chamber's 20 years sentence he was granted early release, two-years short of the two-thirds of the 23-year sentence handed down by the Trial Chamber. See Sieber Report, *The Punishment of Serious Crimes – A comparative analysis of sentencing law and practice* – Version 2.0 / 10 November 2003.
[37] S. Todorović, Early Release Decision, 22 June 2003.
[38] S. Todorović, Early Release Decision, 22 June 2003.
[39] Z. Mucić, Early Release Decision, 9 July 2003.

accorded to the "similarly-situated prisoners" provision in the RPE. Rather than focusing on Mucić's individual circumstances, the President turned his attention to the future status of perpetrators which the Tribunal would convict. He did so by undertaking a review of the practices of early release in the European countries which enforced the Tribunal's sentences and established a threshold.[40]

Setting this two-thirds threshold opened the door for future prisoners to apply for early release at this point, including in countries such as Spain, where perpetrators are generally considered eligible for release after serving three-quarters of their sentence.[41] Effectively, a common "threshold"[42] was now set for considering release at two-thirds, thus displacing the enforcement state law on eligibility. By establishing this threshold of two-thirds, the President fixed the interpretation of "similarly-situated prisoners" factor to all perpetrators convicted by the ICTY. They were to be considered "similarly-situated" by virtue of being convicted by the same Tribunal, rather than by the typology of the perpetrator; for example if they had been a direct perpetrator, or a senior state official instigating atrocity crimes, or a commander failing in his duty to protect civilians or punish crimes committed under his watch,[43] or the types of crimes (rape, murder or beating) they had committed.

Thirdly, the President does not consider the fact that, in nearly all the signatory states,[44] early release was usually conditional and is explicitly recognised in 25 of the 54 decisions which noted that the perpetrator is eligible for early release "on probation"[45] or "on parole",[46] or "on conditional release"[47] under the eligible law of the enforcement state. Early release's unconditional nature is the most controversial aspect of the practice.

[40] He did this because Mucić was not serving his sentence in an enforcement state, but was still detained in UNDU (UN Detention Unit) in The Hague.
[41] S. Todorović, Early Release Decision, 22 June 2003, para. 5; Šantić, Early Release Decision, 16 February 2009, para. 7; and Josipović, Early Release Decision, 30 January 2006, para. 4.
[42] B. Holá and J. van Wijk, 'Life after Conviction at International Criminal Tribunals' (2014) *Journal of International Criminal Justice* 12(1): 109 -132 at 124.
[43] Kovač, Early Release decision, 3 July 2013, para. 20 – whereby President Meron distinguished typologies of perpetrators, refusing to consider a direct perpetrator as "similarly-situated" to a perpetrator found guilty under command responsibility. Obrenović's criminal responsibility was derived primarily from his responsibilities as a commander and his failure to have prevented his subordinates from committing heinous crimes. In contrast, Kovač directly perpetrated the crimes.
[44] With the exception of the UK, whereby early release is granted in general unconditionally.
[45] Five decisions noted that the perpetrator was eligible under national law, 'on probation' – Bala, Blagojević, Kovač, Krnojelac, Obrenović.
[46] Seven decisions noted that the perpetrator was eligible under national law, 'on parole' – Alek, Borovčanin, Češić, M. Jokić, Josipović, Zelenović.
[47] 14 decisions noted that the perpetrator was eligible under national law to 'conditional release'.

This downgrading of eligibility for early release, from the exception to a general rule, was set by President Meron's successor, Pocar. In only one of President Pocar's eight grants of early release did he note the completion date of a perpetrator's sentence. Thereafter, the completion date for a sentence was not mentioned in a successful application for early release. The only occasion in which President Pocar noted the completion date was to emphasise that Kubura had nearly served his full sentence, which weighed in his favour, another example of the balance being tilted in favour of the perpetrator. [48] By 2006, the measure for considering release had effectively been lowered by one-third. The general calculation was when the perpetrator had served two-thirds of the sentence,[49] rather than when they were due to complete their full sentence.

5.3.3. Other Special Circumstances

In line with the reoriented focus on perpetrators' time served, the word "exceptional" or phrase "other special circumstances" began to decrease under the Presidency of Pocar. The pattern which appears to have been initiated under President Meron, the emphasis on treating all perpetrators convicted by the Tribunal equally, continued under President Pocar. It was another indication that the balance had shifted in favour of the perpetrator. When President Pocar first granted early release, in the case of Josipović, he noted that the Spanish authorities had indicated that "exceptional circumstances" existed in favour of Josipović being granted early release at two-thirds of his sentence, rather than the usual three-quarters under Spanish Law.[50] However, Josipović's exceptional circumstances contrasted to Todorović's. Todorović had promised to provide on-going cooperation with the Prosecutor,[51] whereas Josipović's circumstances were his good behaviour in prison, his family ties, and a positive report from the Spanish authorities.[52] The assertion that good behaviour in prison constitutes exceptional circumstances, or that it was considered as a relevant factor, was strongly contested by almost all interviewees in The Hague and in BiH. It runs counter to logic to consider obedience to prison rules as significant as all perpetrators are "required to behave well in prison".[53]

[48] Amir Kubura, Early Release Decision, 11 April 2006.
[49] The Presidential decision no longer calculated the date to which the perpetrators' full sentence would be served.
[50] D. Josipović, Early Release Decision, 30 January 2006.
[51] S. Todorović, Early Release Decision, 22 June 2003.
[52] D. Josipović, Early Release Decision, 30 January 2006, paras. 10-12.
[53] For a detailed discussion on Good Behaviour in Prison, see Chapter 6, s.6.6.1.

5.3.4. *Stare Decisis* Approach

Judicial writing and interview analysis indicate that the application of *stare decisis* caused the downgrading from exceptional circumstances being required to simply serving two-thirds of the sentence.[54] This approach, adhering to established precedents, appears to have narrowed Presidents' consideration to "similarly-situated prisoners", and thus caused them to overlook factors such as "gravity of the crime", a "demonstration of rehabilitation" and "substantial cooperation with the prosecutor".[55] President Pocar's decision to grant early release to D. Tadić hints at this tendency. Despite President Pocar's judicial colleagues raising doubts, "as to whether Tadić had actually demonstrated rehabilitation as opposed to good behaviour, none objected to his application being granted".[56] The one factor that weighed in Tadić's favour was that he had already served over two-thirds which appears to override the others. President Pocar concluded that "notwithstanding the gravity of his crimes, I also note that Tadić has served more than two-thirds of his sentence. Considering that other convicted persons similarly-situated have been eligible for early release after serving two-thirds of their sentence, this factor supports his eligibility for early release".[57] The *stare decisis* approach was made explicit by President Pocar a few months later in his grant of early release to Vuković. On this occasion, he noted that while some of his colleagues were not in favour of early release, he would grant Vuković early release, given that he had already served a little over two-thirds. He noted that, "while not a rule, early release has been granted to a number of convicted accused at the Tribunal on the serving of two-thirds of their sentence where their behaviour in prison has been exemplary and signs of rehabilitation established".[58] This approach was reflected in a statement by a Tribunal judge who had been consulted in a number of early release decisions. He recognised the similarly-situated factor as dominant[59] and simultaneously implied that the balance would be in their favour: "I think the other considerations, namely 'has he reached two-thirds?' 'Are there different circumstances to treat him differently?' [These] are more important than the rest."[60]

Numerous interviews in The Hague emphasised the dominance of precedent, in addition to the Presidents' habit of reading the law and details provided in the application in favour of the perpetrator, thus continually advantaging the perpetrator. There are two apt quotations: one

[54] A. Orie, '*Stare decisis* in the ICTY Appeal System: Successor Responsibility in the Hadzihasanovic Case' (2012) *Journal of International Criminal Justice* 10(3): 635-644.
[55] Rule 125 of the Rules and Procedure of Evidence, adopted 11 February 1994.
[56] D. Tadić, Early Release Decision, 17 July 2008, para. 20.
[57] D. Tadić, Early Release Decision, 17 July 2008, para. 17.
[58] Confidential, Decision of the President on Commutation of Sentence, *Prosecutor v. Zoran Vuković*, 11 March 2008, made public 15 July 2008.
[59] Second public redacted version of "Observations of the Defence for Mr Lubanga on a reduction in sentence, referenced ICC-01/04-01/06-3151-Conf-Exp, of 14 July 2015, under 'Applicable Law' – "released even though none of the other conditions laid down by the legal texts were met", para.10.
[60] Interview, Judge, The Hague, morning 30/01/2017.

revealing how the practice began, and the second how it continued, relatively unchanged. One judge, when asked whether he remembered what the 2003 Annual Report referred to, when it noted that the Bureau worked on, "the harmonisation of early release of the accused",[61] responded that "the whole idea was to decide on a policy which would regulate early release and to stick to it".[62] This phrase "stick to it" is indicative of a *stare decisis* approach to judicial decision-making in the context of early release. Although judges have not formally adopted such an approach, they have recognised that they "are reluctant to overturn prior doctrinal pronouncements due to concerns of stability of the law"[63]… as reflected in President Pocar's references giving weight to the general practice of granting early release after two-thirds of the sentence being served.[64] This was similarly noted by another judge, who wished to make clear that he was "not criticising" the President, as he acknowledged his concern that the President's approach was rather "formulaic".[65] He explained the approach by emphasising that "it is well-established during many Presidencies … and they all are hesitant to change, because it is difficult to establish new things while such an institution is running".[66]

The principle of precedent is practised to provide certainty and consistency in the administration of justice, usually within a court setting, and for the benefit of those involved in the process. For those involved in a legal process, the law should be known (that is transparent) and predictable. In relation to ICL this principle of consistency is "one of the fundamental principles of justice".[67] Consequently, the practice of sentencing by the ICTs has attracted much academic scrutiny.[68] In the context of early release for perpetrators convicted by the ICTY, it is apparent from both the practice and the interview material that judges believed that the law should be applied consistently, albeit not in a blanket manner.[69] In addition to the sentiments expressed above by the two judges, it is reflected by the fact that the President largely accepted applications by perpetrators who directly petitioned the

[61] ICTY Annual Report 2002, para.31.
[62] Interview, Judge, The Hague, morning 30/01/2017.
[63] A. Orie, '*Stare decisis* in the ICTY Appeal System: Successor Responsibility in the Hadzihasanovic Case' (2012) *Journal of International Criminal Justice* 10(3): 635-644.
[64] The two-thirds been served was cited in the perpetrator's favour in three of eight of President Pocar's grants of early release.
[65] Interview, Judge, The Hague, afternoon 30/01/2017.
[66] Interview, Judge, The Hague, afternoon 30/01/2017.
[67] B. Holá, 'Sentencing of International Crimes at the ICTY and the ICTR: Consistency of Sentencing Caselaw' (2012) *Amsterdam Law Forum* Fall Issue, citing A.J Ashworth, 'Sentencing Reform Structures' (1992) *Crime and Justice* 16: 181-242 at 183.
[68] S. Beresford, M. Bassett, S. d'Ascoli, A. Danner, M. Harmon and F. Gaynor, B. Holá, M. Onderco, S. Ruiter, W. Schabas.
[69] All seven Tribunal judges noted that all perpetrators should be considered at two-thirds, and that the law should not be altered but that this did not mean they should all be granted release at this stage.

President (a point of concern raised by Symons in 2004)[70] for a grant of early release, despite their not being eligible on a strict reading of Article 28 of the Statute.[71] It was only five years later that the practice was formalised by law when the Practice Direction was amended on 1 September 2009 to enable perpetrators to apply directly to the President when they deemed themselves eligible. This amendment was noted in some interviews and most judges were not familiar with this specific in the Practice Direction. On the occasions where this was raised interviewees emphasised the importance of equality between all perpetrators and practising the law to accord with this general principle of law.[72] Allowing a direct petition would ensure that perpetrators who may not be eligible under national law (or detained in the UNDU) would not be at a disadvantage compared to other perpetrators, thus ensuring the principle of equality.

In addition to the dominance of "similarly-situated" prisoners and the *stare decisis* principle it indicates that Presidents went beyond a strict reading of the Statute, and applied a misguided reading of the principle of equality for all perpetrators convicted by the Tribunal. Not all perpetrators are equal, the gravity of their crime differs, as does their typology, a point explicitly emphasised by some judges themselves (s.5.4.2). The misguided principle of equality was that it became a blanket reading of "similarly-situated prisoners", and thus resulted in a normative (legality) deficit at its core.

The *stare decisis* approach lacked sociological legitimacy, including for those at the Tribunal itself. One interviewee in The Hague, albeit in a carefree manner, described the Tribunal's Presidents as "doing a factory cookie-cutter approach. Everyone is getting two-thirds. Very rare departures … one-third off, one-third off, one-third off … come hell or high water". He reflected that the Presidents wanted to "apply a single mathematical standard".[73] His words "come hell or high water" implies a bias in the Presidents' decisions, that there was an active tendency to grant early release. The phrases "cookie-cutter" and a "mathematical standard" imply a lack of rigour in the Presidents' determinations. The *prima facie* superficiality in considering the other factors, in particular the demonstration of rehabilitation, is discussed in the following chapter, as a widely discussed legitimacy deficit, when interviewees were informed of this being a factor the President is required to consider.

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[70] L. Symons, 'The Inherent Powers of the ICTY and the ICTR' (2003) *International Criminal Law Review* 3(4): 369-404. See Chapter 4, s.4.5.

[71] Kolundžija, Kos, Mucić, Josipović, Kubura, M. Jokić, Strugar, Šantić, all applied directly to the Tribunal for early release despite there being, up until September 2009, no provision in the Rules and Procedure of Evidence to do so.

[72] The principle of equality was emphasised by senior legal staff at the Registry and the President's Office and several of the judges when this amendment was noted.

[73] Interview, Senior Staff Member, The Hague, 24/01/2017.

5.4. The Power of the President

5.4.1. The Presidents' Capacity to Limit the Scope for Considering the Gravity of the Crimes

The Presidents' reading of the factor of "similarly-situated prisoners" under the RPE was read broadly and applied in a *stare decisis* approach which favoured the perpetrator (s.5.3.2 - s.5.3.4) contrasted to the Presidents' consideration of the "gravity of the crime" factor.[74] This implied a tendency to favour the perpetrator and had a similar effect of benefiting the perpetrator; and this was the second factor which led to the practice of UER becoming a standard rather than an exception.

On occasion, the Presidents applied a strict reading of the black letter law when the Prosecutor had attempted to broaden its scope, for example by drawing the President's focus onto the gravity of the crime,[75] or the inability to apply conditions on release.[76] The Prosecutor undertook these attempts through their response to one question deriving from the RPE. Under Rule 125, the President is required to consider whether the prisoner has provided any "substantial cooperation with the Prosecutor".[77] In line with the Practice Direction, the Registry writes to the Prosecutor and requests them to report "any co-operation that the convicted person has provided … and the significance thereof" during the perpetrator's time in prison.[78] When the Prosecutor submitted factors beyond this question, President Pocar (2005-2008) flatly rejected the Prosecutor's attempts to influence him with negative factors (for example, a re-emphasis on direct perpetrator's *actus* and personal circumstances on possible release, detailed below). Prior to President Pocar's tenure, no decisions reference the Prosecution noting anything other than cooperation, or lack of, with their Office. During President Pocar's tenure, direct perpetrators[79] were being considered for early release. Until that time, the early released perpetrators (with the exception of Todorović,[80] who had cooperated

[74] ICTY Rules and Procedure of Evidence, Rule 125.
[75] D. Tadić, Decision of the President on the Application for Pardon or Commutation of Sentence of Duško Tadić, 17 July 2008; and H. Delić, Decision on Hazim Delić's Motion for Commutation of Sentence, 24 June 2008.
[76] H. Delić, Decision on Hazim Delić's Motion for Commutation of Sentence, 24 June 2008 and M. Jokić, Decision of the President on Request for Early Release, 1 September 2008.
[77] ICTY Rules and Procedure of Evidence, Rule 125.
[78] Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the International Tribunal, April 1999, para. 3(c).
[79] Perpetrators who had directly committed acts of murder, torture or inhuman treatment rather than those who had failed to protect persons from these acts where it was their responsibility to do so or failed to punish perpetrators who did so.
[80] Todorović found guilty of rape and murder under Article 7(1) of the Statute, para. 36-41 and under Article 7(3) the crime of persecution (arbitrary detention, inhumane treatment, and wanton destruction, para. 42-48), See: Todorović, Sentencing Judgment, 31 July 2001.

with the Prosecutor), were guilty of failing to prevent, punish or were complicit in crimes.[81] Most had not voluntarily committed violent crimes first-hand. [82] This direct perpetrator may be one of the factors that motivated the Prosecution to push for broadening the scope of factors that the President considered. In the case of Delić, found guilty of directly committing murder and torture (as grave breaches of the Geneva Convention)[83], the Prosecutor argued that standing should be granted to him to make submissions rather than solely answering questions concerning the "prisoner's cooperation".[84] Although other perpetrators had been released early from prison in Finland, the Prosecutor took the opportunity, in the case of Delić, to advocate that they should be granted leave to submit objections to early release, given that under Finnish law the Prosecution had standing. They compounded this argument by pointing to the "seriousness"[85] of Delić's offences. President Pocar refused to consider this information, and observed that the Practice Direction "does not allow for the Prosecution to make submission on the national law of Finland, or any other matter, unless I specifically request it to do so".[86]

Although President Pocar's decisions provided more detailed considerations of the gravity of the crimes, for example particular brutality of specific acts,[87] than his predecessors had, he makes it clear in this decision that he would consider the details of the crime on his own terms only, and not in the way the Prosecutor described them. He further cited the *stare decisis* principle as a reason for his decision: "I do not consider it appropriate at this stage of the International Tribunal's history to change its long-standing practice by allowing the Prosecution to make submissions on a convicted accused's application". [88] The President's refusal to consider other factors that weighed against the perpetrator signifies two matters. First, the long-standard practice, the focus on consistency and foreseeability, overrides the logic of examining applications on a case by case basis, including the "gravity of the crime",[89] as he is required by RPE. The factor of "similarly-situated prisoners" apparently prevailed. Second, as demonstrated in the Delić decision, although he does not justify his refusal to exclude these factors, it is an indication of the balance being slanted firmly in favour of the

[81] Aleksovski, Blaškić, Mucić, Zarić, Furundžija, Došen, Kolundžija, Kos and Kvočka.
[82] M. Simić had been directly participated in the beating, including of the head and genitals, of four detainees. Erdemović had directly perpetrated crimes but had done so under duress. Erdemović, the first perpetrator convicted at the ICTY and the first granted early release had killed approximately 70 men as part of the Srebrenica massacre.
[83] *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo (Čelebići Case*), Appeals Chamber Judgment, 20 February 2001. Delić, count 48 - "cruel treatment as a Violation of the Laws or Customs of War: Conviction Confirmed', para. 60.
[84] Rules and Procedure of Evidence, Rule 125.
[85] H. Delić, Early Release Decision, 24 June 2008, para. 9.
[86] H. Delić, Early Release Decision, 24 June 2008, para. 10.
[87] For example, in the case of Delić, his particular brutality, including the specific act of electrocuting his victims; H. Delić, Early Release Decision, 24 June 2008, para. 19.
[88] H. Delić, Early Release Decision, 24 June 2008, para. 10.
[89] Rules and Procedure of Evidence, Rule 125 the first factor listed for the President to consider.

perpetrator. President Pocar refused to consider factors that would provide counter or additional elements which would disadvantage the perpetrator.

President Pocar's refusal to broaden considerations of gravity of the crime by allowing the Prosecutor to make specific submissions indicates the broad discretion afforded to the President. President Meron repeated this during his second Presidency (see s.5.4.2). In a number of early release applications, the Prosecutor emphasised that perpetrators did not cooperate with his office. In these instances, President Meron countered, "there is no obligation on an accused or convicted person to cooperate with the OTP absent [of] a plea agreement to do so. I therefore place neither positive nor negative weight on this factor".[90] In this statement, the President makes explicit that his decisions on whether to grant early release will not be swayed into a negative reading for the perpetrator. This statement provides another illustration of the President making clear to the Prosecutor that, despite their attempts, he will not add further arguments against the perpetrator. Again, the President noted his broad discretion: he is determined to "stick to it"[91] (the two-thirds threshold) against the other factors he was required to consider.

Tribunal Presidents stated limited willingness to considering gravity of the crime was a deficit in UER's sociological legitimacy for many BiH interviewees. With the exception of BiH judges, UER was considered incongruent, given the nature of atrocity crimes, which Chapters 6, 7 and 8 detail.[92] The majority of interviewees in BiH were not aware that there was a list of factors that the President was required to consider in any application for an early release.[93] When interviewees were informed of the factors and asked to list the priority they would accord them, 30 of the 51 interviews said that the primary factor for the President to consider was the gravity of the crimes. Of these 30 interviews, six went on to argue that it was consequently illogical to grant early release if gravity was considered, given the nature of the crimes convicted at the ICTY: "I don't see how, on the basis of the gravity of the crimes, anyone can be granted early release".[94] One interviewee expressed surprise to hear that gravity was required to be considered given the numbers granted UER. He reflected that perhaps this disconnect existed because of the length of time since the crimes were

[90] Early release decisions of Blagojević and M. Radić early release decisions in particular.
[91] Interview, Judge, The Hague, morning 30/01/2017, cited above s. 5.3.3. *Stare Decisis Approach*
[92] The perceived incongruence: Chapter 6, the manner in which the President considered rehabilitation for perpetrators of atrocity crimes, given the nature of the crimes and in many instances the perpetrator. Chapter 7, the moral condemnation expressed by the sentence is diluted at UER; and Chapter 8, the grave crimes committed against victims' is seen as being belittled by their perpetrators' UER.
[93] Rules and Procedure of Evidence, Article 125 – the President is required to consider: gravity of the crime, similarly-situated prisoners, substantial cooperation with the Prosecutor and evidence of the prisoner's demonstration of rehabilitation.
[94] Interview, ICTY Staff Member, Sarajevo, BiH, 08/11/2017.

committed and, since it was a "paper decision" only, there being no oral testimony: "the tremendous cruelty, the tremendous suffering, we tend to forget about it if … you don't refresh the memory [and] talk about it more or less academically, we get used to it in a way".[95] Certainly, the perpetrators' crimes were generally referenced, and indeed in an academic way as the crimes were detailed through the language of, or cross-reference to, the Trial or Appeals Chambers judgment or both. However, the President has often been involved in convicting and or sentencing the perpetrator and would have heard the testimony of victims' first-hand, and had a sense of the gravity of the crimes. Yet, as noted above, both Presidents Pocar and Meron made clear, in rejecting the Prosecutor's attempt to put gravity to the fore again that they did not wish to refresh their memories, at least not through oral testimony.

The decisions make clear that the Prosecutor had perceived gravity as an important factor which should be emphasised in considering release, and one senior staff member echoed the sentiment expressed by the interviewee above, that it would have been a better practice to "refresh" Presidents' understanding of the gravity. He noted this in response to the point that President Pocar had refused to consider the Prosecutor's submissions. The interviewee implied he supported this consideration being given special attention as he asserted that "the voice of the victims should be coming in at this point as to the gravity [and] saying 'no, this is not what the judges expected'".[96] Another interviewee at the Tribunal spoke to the point raised by an interviewee in BiH about memory and the need to refresh it; the suggestion that time will diminish the significance of the gravity factor. The Tribunal interviewee expressed his concern at the trajectory of the Presidents' decision-making, as he commented that "as time passes, the focus will be on the accused's ill-health and not enough thinking on the gravity of the crimes anymore, I think that this is a real risk".[97] These comments indicate that there were doubts in these interviewees' mind as to the extent to which the Presidents fully considered the first factor, gravity of the crime. It is impossible to verify these doubts without speaking to the current[98] and former Presidents themselves,[99] how, or the extent to which,

[95] Interview, IGO, Sarajevo, BiH, 21/12/2017. This sentiment was expressed by another who noted that the judges should look at the details "when you put them as numbers it doesn't mean much, he's killed 20 people … but when you take it down to that level and say okay it's a ten-year-old, a family, it paints a totally different picture", Interview, Individual working in an independent state institution with extensive work experience in IGOs, Sarajevo, BiH, 20/12/2017.
[96] Interview, Senior Staff Member, The Hague, 24/01/2017.
[97] Interview, Senior Staff Member, The Hague, 02/01/2017.
[98] Current at time of interviews, January – February 2017.
[99] As noted, one former President was interviewed, when ask the extent to which gravity was considered he simply said he had considered it, but his emphasis was on rehabilitation.

gravity was and is considered.[100] Nevertheless, gravity of the perpetrators' crime has never, by itself, swayed the President to deny an early release outright.[101]

5.4.2. The Presidents' Definition of Similarly-Situated Prisoners

The proposition that the President had decided on the two-thirds threshold and that he would "stick to it"[102] was not without exception. As this chapter demonstrated, there have been incidents of inconsistencies across the 54 positive early release decisions (s.5.3.2) both between the various Presidents and within the decision-making of the same President. In the case of Kovač, the President refused to consider him "similarly-situated" to Obrenović – due to the differing nature of their crimes. Indeed, many interviewees, both in The Hague and in BiH, did not approve of the blanket application of "similarly-situated prisoners" on the basis of having been convicted by the same Tribunal. The provision was open to other interpretations, given that the Tribunal convicted perpetrators of different typologies. This was recognised on one rare occasion, when President Meron invoked a distinction in typology. The perpetrator had drawn attention to it, as his application had noted a fellow perpetrator who was granted early release without serving two-thirds of his sentence. President Meron rejected this argument for two reasons. First, he noted that Kovač, unlike Obrenović, had not provided any cooperation with the Prosecutor. Second, and significantly, he noted that "Obrenović's criminal responsibility was derived primarily from his responsibilities as a commander, and his failure to have prevented his subordinates from committing heinous crimes. In contrast, Kovač directly perpetrated the crimes".[103] This was one of the exceptional cases[104] where the President decided to deny early release at two-thirds, requiring Kovač to serve a further six months of his punishment. Kovač's delayed early release serves to highlight that the President had the power to interpret factors at his discretion and he would not always do so in favour to the perpetrator. He was, "in very rare departures"[105] willing to override the two-thirds practice – yet, this did not extend to deny UER outright.

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[100] One former President interviewed began our conversation advising that I should not ask him about any specific cases because it had been some time since he was at the Tribunal and he would not be able to recall them with adequate accuracy.

[101] Galić, Kunarac and Miletić had other factors weighing against them. Galić – as a lifer, Kunarac due to lack of demonstrable rehabilitation and that the German authorities were against his release, and Miletić due to strong collegial objections.

[102] Interview, Judge, The Hague, morning 30/01/2017.

[103] Kovač, Early Release decision, 3 July 2013, para. 20

[104] Of the 54 granted early release only 4 have been deliberately denied early release beyond the two-thirds stage - Blagojević, Bala, Kovač and Radić.

[105] Interview, Senior Staff Member, The Hague, 24/01/2017, cited above.

The Kovač decision is also important as it underlines the inconsistencies in the Presidents' determinations. In the majority of the determinations, Presidents simply referenced the "similarly-situated prisoners" as being those who were convicted by the Tribunal. In this decision, the President appears to be swayed by his colleagues who were, he noted, against Kovač's early release. The speculation that the President was influenced by colleagues who took a different approach to considering "similarly-situated prisoners" was spoken to by one judge interviewed in The Hague. This judge was keen to highlight the importance of considering gravity thoroughly, and implied that the President had not taken a nuanced approach:

> gravity of the crime, that is a very big contention for some of us … Some of the convicts had multiple counts of genocide, crimes against humanity, war crimes and you could not really find any extenuating circumstance … I would look at the gravity, the gravity is not the same actually, you could find somebody imprisoned almost for the same period … as somebody who committed less crimes but he is serving the same sentence. I wouldn't put the two in the same category, I would be slower to offer early release to the latter category where there is a multiplicity of grave crimes.[106]

Although the judge here was dissatisfied with early release in relation to the gravity of the crime, the term "category" could also be applied to how the President considered "similarly-situated", that those convicted by the Tribunal are - in fact- different types of perpetrators. In his consideration of Kovač the President could have reasoned and clarified that perpetrators were not similarly-situated, due to the nature of, and their role in, the crimes. Alternatively, he could have simply recorded that his decision to prolong the detention was influenced by his colleagues' opinions. Here he did neither. This lack of clarity does a disservice to the Tribunal, as it appears to take a pragmatic (two-thirds mathematical standard) over a reasoned approach.

This lack of an articulated and consistent approach has resulted in some academics concluding that "paradoxes and disharmony are often hidden and ignored … the absence of principles … weakens the claim that an international court has a rational basis for the execution of democratic principles of punishment".[107] This is argued in relation to the lack of penal principles for execution of sentences; the same reasoning applies to the early termination of these sentences. There have been occasions where the President has attempted to justify his approach; yet, the stated reasons are not without legitimacy challenges, or indeed deficits, including the re-consideration of a perpetrator's guilty plea.

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[106] Interview, Judge, The Hague, 03/02/2017.

[107] G. Vermeulen and E. De Wree, *Offender Reintegration and Rehabilitation as a Component of International Criminal Justice? Execution of Sentences at the Level of International Tribunals and Courts: Moving Beyond Mere Protection of Procedural Rights and Minimal Fundamental Interests?* (Maklu-Publishers, 2014) at 81.

5.4.3. The Presidents' Consideration of Guilty Pleas

Two of the Tribunal's four Presidents, Judge Robinson and Judge Meron,[108] have both considered a guilty plea in favour of perpetrators being granted early release – albeit on different bases. Fundamentally, the consideration of the guilty plea poses a normative (legal) legitimacy challenge to these Presidents' determinations, as it goes beyond the wording of Rule 125. This rule sets out the boundaries for Presidents to consider *inter alia* "the prisoner's demonstration of rehabilitation, as well as any substantial cooperation of the prisoner with the Prosecutor".[109] The use of the word "prisoner", *prima facie*, indicates that a guilty plea lies beyond the scope for consideration, because an individual does not become a prisoner until they are actually serving their sentence, that is, once they have been convicted. This is also reflected in Rule 123, relating to the trigger for the President to consider a pardon or commutation of sentence which refers to the law of the state of imprisonment and the convicted person's eligibility for pardon or commutation under this state's law. The Rules, read together in a logical approach, direct the President to consider substantial cooperation of the perpetrator post-conviction, thereby making a guilty plea an irrelevant factor.

The two Presidents' reasoning for considering a guilty plea in favour of the perpetrator's UER also illustrates the overly broad discretion Presidents had, as they provided two different bases.[110] President Robinson determined that a guilty plea was a "demonstration of rehabilitation". As above, the Rule directs the President to consider a "prisoner's demonstration of rehabilitation"; it would be logical to consider the perpetrator's current demonstration of rehabilitation, rather than one demonstrated a number of years prior. Additionally, President Robinson's decisions do not provide an acknowledgement that the guilty pleas had already been considered as a mitigating factor in the sentencing determinations.[111] Choi critiqued President Robinson for "double-counting"[112] and it remains unclear whether the President did this knowingly or whether it was an oversight.

President Meron took a different approach, and, in contrast to his predecessor, he chose to justify his approach. He argued that a guilty plea could be considered, in the perpetrator's favour, under "cooperation with the Prosecutor" "due to the impact such a plea has on the efficient administration

[108] No other Presidents noted their consideration of a guilty plea.
[109] Rule 125, Rules and Procedure of Evidence.
[110] President Robinson's consideration noted in Early Release decisions of Rajić, Plavšić and Sikirica's and President Meron's consideration articulated in Early Release Decisions of Češić, Dragan Nikolić, Momir Nikolić and Zelenović.
[111] President Robinson's Early Release determinations for Rajić, Plavšić and Sikirica.
[112] J. Choi, 'Early Release in International Criminal Law' at 1814. See Chapter 4, s.4.5.2.

of justice".[113] The President's formulation of the "efficient administration of justice" resonates with the Statute's article on pardon or commutation, which should be decided on the "*basis of the interests of justice and principles of law*".[114] In contrast to President Robinson, Meron considered the value of the guilty plea, not in relation to the perpetrator, or specific benefits emanating from the perpetrator's substantial cooperation, but, rather, in relation to the overall credibility of the Tribunal. A guilty plea, as conceived by President Meron, enabled justice to be dispensed more rapidly, which was, in turn, more beneficial for society in the round, and could enhance the sociological legitimacy of the Tribunal. This opinion is indicated in the two cases he referenced.

Firstly, his own early release determination (which he denied) and, secondly, the Sentencing Judgment of Dragan Nikolić. This prisoner's guilty plea was considered a mitigating factor. The Nikolić judgment listed a number of positive elements of a guilty plea – establishing the truth, freeing witnesses from the onus of testifying in court, encouraging others to come forward, and even promoting reconciliation.[115] In terms of administrative efficiency, the judgment observes that a guilty plea reduces the trial length, thereby speeding up the time in which justice is dispensed.[116] These are arguably all positive factors for post-conflict society. It is noted on the Tribunal's website that guilty pleas save costs, which is good for the Tribunal itself, as resources can be re-deployed. Moreover, investigative teams' expenses for gathering corroborating evidence and travel expenses for witnesses to testify at The Hague are reduced.[117] This more efficient use of funds does not affect the well-being of the perpetrator directly, but was aimed at increasing the perceived legitimacy of the Tribunal in the region. Yet, according weight to a guilty plea in the interests of post-conflict society means that perpetrators benefit - for the second time. [118] This hastens the perpetrator's early release, an outcome which met with very mixed reactions in the region.

Finally, the wording of Rule 125 directs the President to consider "substantial cooperation" rather than cooperation. In determining how a guilty plea is considered, President Meron's decisions[119] do not take a systematic approach. Generally, pleas were considered as "cooperation with the

[113] D. Zelenović, Early Release Decision, 24 June 2008, 30 November 2012 - denied, para. 21.
[114] Article 28 of the Statute.
[115] Dragan Nikolić Sentencing Judgment, 18 December 2003, para. 228.
[116] Set out in the footnote, Zelenović, denied early release decision, para. 21.
[117] See: http://www.icty.org/en/features/statements-guilt [accessed 20/01/2020].
[118] Only one interviewee in BiH responded positively to this argument. As one interviewee reflected, it was "a double reward … if cooperation had been taken into account already … in my personal view, this overstretches the argument of … the efficient administration of justice". Interview, 21/12/2017, IGO, Sarajevo, BiH. Two other interviewees perceived re-consideration of a guilty plea as a "double" reward or consideration. The mixed reactions are detailed in Chapter 7.
[119] President Meron's decisions are the decisions which have taken guilty pleas into account under the factor of substantial cooperation with the Prosecutor – President Robinson considered them under evidence of a demonstration of rehabilitation.

Prosecutor",[120] including where the section being considered is "substantial cooperation".[121] This incongruence indicates the flexibility of interpretation that the Presidents had in their decisions. Further, it is questionable whether the time and resources saved are considered appropriate for perpetrators of atrocity crimes.[122] Yet, there were some occasions whereby interviewees in the region could have perceived "substantial cooperation" with the Prosecutor as being a factor to consider positively for the grant of early release; not, however, for the benefit of the Tribunal's time and resources but for the welfare of society and victims in BiH (see s.5.5).

5.4.4. Narrowing the Decision-Making Process

Of the eight Tribunal judges interviewed, none were content with UER (as of January 2017 and September 2018 respectively); primarily due to the *stare decisis* approach, and the nature of the perpetrator. All but one judge interviewed had been consulted in an application for early release. Apart from one, six of the eight noted that they had raised concerns, and, on occasion, objections, but these six stressed that ultimately, "it is the President who decides"[123] on an UER. This contrasts with many countries' practice, where a parole board will decide jointly on early release, rather than one person deciding.[124] It also contrasts with the practice of the Tribunal in relation to conviction, where the majority of the judges decides on a person's guilt or innocence. Further, a majority opinion would also be in line with the "Collegiate direction of the Tribunal's work" which was set out in the ICTY's first Annual Report. This "collegial direction" was the stated purpose for the President to create the Bureau. The President, in 1994, in conjunction with his judicial colleagues, decided that it was "appropriate to place the governance of the Tribunal in the hands of a small group of members rather than of one individual."[125] Ironically, at the same time as noting the collegial nature of governance mechanisms, a judge noted at The Hague that the President wished to speed up certain matters and have a select few rather than a broader section of judges to consult with on applications under Article 28.[126] On the examination of the ICTY Statute, the determination for a grant of pardon or commutation of sentence had the potential to be much more consultative, as it

[120] With the exception of the Češić Early Release decision, President Meron referenced the RPE factor as "cooperation with the Prosecutor" rather than substantial.
[121] Momir Nikolić, Early Release Decision, 5 October 2015, "the entry of a guilty plea by an accused person pursuant to a plea agreement with the Prosecution constitutes cooperation with the Prosecution, due to the impact of such a plea on the efficient administration of justice", Public Redacted Version of the 14 March 2014 Decision on Early Release of Momir Nikolić, para. 28.
[122] M. Scharf makes this case in relation to lower sentences granted based on guilty pleas; M. Scharf, 'Trading Justice for Efficiency: Plea-Bargaining and International Tribunals' (2004) *Journal of International Criminal Justice* 2(4): 1070-1081; and see Chapter 4, s.4.4.1.
[123] Interview, Judge, The Hague, morning 30/01/2017.
[124] See: https://e-justice.europa.eu/content_member_state_law-6-en.do [accessed 20/02/2020].
[125] ICTY Annual Report 1994, para. 70.
[126] Application for a pardon or commutation of sentence

reads "*The President of the International Tribunal,* in consultation with the judge*s, shall decide the matter on the basis of the interests of justice and the general principles of law.*[127] The Tribunal judge noted, however, that: "at the time the way the rules were imposed on the President to consult basically the Plenary of Judges … from what I can remember … upon the suggestion of the then President this would be a cumbersome procedure, having to convene a plenary each time and therefore he said 'can we substitute the Plenary with the Bureau?"[128]

The judge also recollected that the President made this request on the presumption that holding a plenary would be a "cumbersome procedure which would allow huge objections each time and a consultative process which would be never ending".[129] In addition to the President actively narrowing the consultative process, this judge's statement implies two further matters. Firstly, the President was deliberately overturning the written constraints on his power, those were "the rules *imposed on him*".[130] Secondly, there was a recognition at the early stage of the Tribunal's lifetime that the grant of pardon or commutation of sentence would be a controversial decision as it would raise "huge objections", making the process "never ending". His statement implies that the President decided to avoid this broad consultative process, and, rather than consulting with 11 judges of the plenary, he narrowed the decision to consult with only four judges of the Bureau.

As the ICTY was the first International Criminal Tribunal which established a legal mechanism to allow for a pardon or commutation of sentence for perpetrators of the most grave crimes;[131] it was effectively establishing a norm. With this in mind, having a full plenary of judges to consult with would could have increased the legitimacy of exercise. The consultative process, as a means to maintain legitimacy, echoes the standard of "legitimation through participation" (Chapter 3, s.3.5.6). That is "norms can be justified if … consideration is given to the interests of all those who are possibly involved".[132] As the plenary of judges, on strict reading of Article 28 of the Statute, were those intended individuals to be involved in the decision, in turn establishing principles underlying a new norm, it was these judges who should have also been involved at this stage.

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[127] ICTY Statute 28 and UNMICT – emphasis added.
[128] Interview, Judge, The Hague, morning 30/01/2017.
[129] Interview, Judge, The Hague, morning 30/01/2017.
[130] Emphasis added.
[131] The Tribunal's predecessors, the Nuremberg and Tokyo Tribunal had not envisaged a pardon or commutation of sentence for perpetrators. Although a number of those convicted were granted clemency this was done through government and executive negotiations and decisions, see Chapter 1, Introduction.
[132] J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy,* translated by William Rehg, (The MIT Press, 2nd edition, 1996) at 108.

So far the chapter has outlined the normative (legal) legitimacy deficits arising from the Presidents' broad discretion of decision-making. Nevertheless, there are important exceptions to the narrow approach taken (notably limiting the scope for considering gravity of the crime and *stare decisis*). These exceptions are important and s.5.6 argues that they should be widely known, as findings from the interviews in BiH indicate that knowledge of the decision-making process and outcomes could have ameliorated the level of frustration with the practice of UER. This finding speaks to Tyler's proposition that Procedural Justice enhances sociological legitimacy, even in cases of negative decisions (Chapter 3, s.3.5.3).

The narrow decision-making process, whereby ultimately the President decides, prompted an exasperated response in one interviewee in BiH who stated that UER was a "one-man show".[133] However, a careful reading of the decisions provides evidence that this was not always the case, and that the President has, on occasion, taken other opinions into account and decided accordingly.

5.4.5. The President Considers Others' Opinions

When the fieldwork in BiH was conducted (September - December 2017)[134] there were five instances, publicly available, in which the President had postponed an early release beyond the two-thirds standard, due to consideration of others' opinions. [135] In two of these decisions, the President noted his decision was taken, in part, due to his consideration of his colleagues' opinions. He denied immediate release in Bala's case, despite Bala having served two-thirds. In order to grant release he required Bala to continue to show good behaviour while in prison. He observed that, "these conditions and the fact that by 31 December 2012 Bala will have served almost 10 out of the 13 years of his sentence should suffice to assuage my colleagues' concerns over Bala's lack of rehabilitation".[136] The President makes explicit here that his decision to prolong Bala's detention was taken, at least in part, to satisfy his colleagues.

On three other occasions, he appeared to accord weight to the enforcement state. As noted in s.5.2.1 under the Statute it is the perpetrator's eligibility under the enforcement state law that

[133] Interview, IGO, Sarajevo, BiH, 01/12/2017.
[134] The BiH interviewee above who expressed the view that the Tribunal's practice of UER was an unfortunate case of the President being a 'one-man' show was giving his immediate and frustrated response, as he was informed that it is the President who decides, although he consults colleagues.
[135] Noted in Blagojević, Bala, Kovač, Radić and Kunarac early releases decisions.
[136] H. Bala, Early Release Decision, 9 January 2013, para. 39.

triggers an application for a pardon or commutation of sentence. [137] The enforcement state has no authority to grant UER; it is the President who decides. Nevertheless, the enforcement states have on occasion indicated that they would not grant an early release if the decision was theirs. On the first occasion the President appeared to accord weight to the enforcement state; he noted he had considered the Norwegian authority's decision to deny the perpetrator, Blagojević, release on probation under Norwegian law. Although the Norwegian authorities had denied Blagojević's release on probation, they had sent, as per the Statute, notice to the Tribunal President that Blagojević was eligible under their law and it was for the President to make the final decision. However, Norway reasoned that they denied Blagojević probation due to the "serious crimes" for which he was convicted combined with the "universal sense of justice" and that there were a further five years remaining for the sentence "being completed".[138] The President acknowledged that he gave weight to this, noting that, although both the similarly-situated prisoners argument and his good behaviour in prison weighed in Blagojević's favour, his immediate release was withheld due to his being denied release on probation by the Norwegian authorities, coupled with the gravity of his crimes.

In February 2017, the President for the first time denied outright early release to a perpetrator who had served over two-thirds of his sentence.[139] An interviewee from The Hague[140] forwarded the decision and emphasised in the correspondence that the German authorities were not in favour of early release, which may have assisted the President in denying the application. This correspondence implied that the President's decision was largely pragmatic, as he emphasised that the German authorities were willing (therefore they incurred the expense) to continue to detain Kunarac. One interviewee at The Hague directly noted this financial factor being a possible influence on UER. The reliance on the enforcement state was emphasised by the interviewee who further argued "no third state really wants to enforce a sentence of one of these people. Number one because it is expensive".[141]

Other pragmatic influences of the enforcement state were implied by another Tribunal senior member interviewed later the same day. This interviewee had noted that transferring a perpetrator from one enforcement state to another was "very diplomatically difficult" and argued that "we rely on third States to enforce sentences … no third State really wants to enforce a sentence of one of

[137] Article 28 of the Statute, cited s.5.2.1 and see s.5.4.3 outlining the divergence of the written law and practice for applications for UER.
[138] V. Blagojević, Early Release Decision, 3 February 2012, para. 15.
[139] D. Kunarac, Early Release Decision, 2 February 2017.
[140] The interviewee sent the President's Decision to Deny Early Release to Kunarac (made publicly available that day) a few hours after the interview was conducted.
[141] Interview, Senior Staff Member, The Hague, 02/02/2017.

these people".[142] The interviewee's argument is supported by example of Krstić. Krstić, after being attacked in prison in the UK, spent over three years in transit at the UNDU before being transferred to Poland to serve his sentence.[143] This meant the costs of his detention during these three years were also borne by the Tribunal rather than an enforcement state.[144] Thus, the Kunarac decision, according to the interviewee who sent the decision, and supported by another interviewee who emphasised that the Tribunal relied on enforcement states, implies that the President's decision to deny UER was influenced by pragmatism (financial and practical) in this instance. That was, the enforcement state's willingness to continue to detain Kunarac at their own expense.

The power dynamics between the Tribunal and the enforcement states are unknown but are hinted at above by these two senior staff members. That the Tribunal relies on states to bring the perpetrators they indict before them, given that it has no police force under its control, so too does it rely on states to enforce the sentences they determine, given that they have no prison of their own.[145] The President cannot force states to enforce perpetrators' sentences. Although they may have the power on paper, this does not necessarily translate into action. The discrepancy between written words and power, or "actualised power"[146] is suggested in two early release decisions whereby it was noted that the enforcement state had approved a conditional release prior to the President's approval. [147] Furthermore, bilateral agreements between the Tribunal and the enforcement state provide all states with a caveat of terminating the detention of a perpetrator if it becomes "impossible"[148] to enforce their sentence. In relation to Presidents' determination on the grant of a pardon, commutation of sentence, or an early release, most enforcement agreements require the states to "act accordingly" or "comply with" [149] the President's decision. However, there

[142] Interview, Senior Staff Member, The Hague, 02/02/2017.
[143] Serb military commander Krstić was the convicted perpetrator of genocide in Srebrenica was attacked on 8 May 2010 by Muslim prisoners in jail (BBC); returned to The Hague's UNDU, 23 December 2011, see: http://www.balkaninsight.com/en/article/icty-radislav-krstic-transferred-back-to-the-hague transferred to Poland 21 March 2014, see: http://www.thenews.pl/1/10/Artykul/165901,Srebrenica-war-criminal-transferred-to-Polish-prison [accessed 30/10/2019]
[144] Enforcement states bear the costs of the perpetrators' imprisonment. Although the UNDU is in The Hague, the costs of the detention are borne by the Tribunal not the Dutch state. See Host State Agreement Agreement between the United Nations and the Kingdom of the Netherlands concerning the Headquarters of the International Residual Mechanism for Criminal Tribunals, whereby the Detention Unit is included as an ICTY/UNMICT Premise (Article 1 (o) and that the ICTY/UNMICT and that the Tribunal / UNMICT has control over the premises, Article 7(1) See: https://www.irmct.org/en/basic-documents/agreements-un-member-states [accessed 30/10/2019]
[145] See: https://www.irmct.org/en/about/functions/enforcement-of-sentences [accessed 30/10/2019]
[146] J.N. Clark, ' International Criminal Courts and Normative Legitimacy: An Achievable Goal' (2015) *International Criminal Law Review* 15(4): 763–783 at 771 who refers to A. Arendt "who argues that power is actualised, *inter alia*, 'only where word and deed have not parted company" *The Human Condition* (1958) (University of Chicago Press, 2nd edition, 2019)at 200.
[147] Noted in Mrđa, Early Release decision, para. 15 and Josipović, para. 12. Both perpetrators were detained in Spain.
[148] See: http://www.icty.org/en/documents/member-states-cooperation [accessed 30/10/2019]
[149] States shall "act accordingly" – Belgium, Austria, Poland, UK, Norway, Finland, Portugal and Ukraine, and Germany's individual enforcement agreements for Germany, *ad hoc* agreements for Đorđević, Tarčulovski, Galić, Kunarac, Tadić;

are some notable discrepancies in the Tribunal's agreements with different states. The agreements with Spain, France, Slovakia and Italy provide that if the President rejects the application for early release that enforcement will no longer be possible, and the Tribunal will "make arrangements for the transfer of the convicted person".[150] The agreements with Denmark, Estonia, and Sweden note that they "will consider the President's response"[151] which implies that if the state declines to retain the perpetrator, the Tribunal will arrange for them to be transferred to another state or the Tribunal. The power of the enforcement state to influence the Presidents' decisions on applications for UER was directly noted by two Victims' Associations (VAs) in BiH, who stated that the President had informed them that early release was due to the Tribunal having to "rely" on enforcement states to detain the perpetrators.[152] Although both VAs were disappointed and discontent with the practice they both accepted this explanation provided by the President.[153] This finding speaks to the legitimacy standard of "legitimation through justification"[154] whereby it has been asserted, and demonstrated in the above interviews, that by explaining "controversial decisions"[155] institutions can maintain "a modicum of cognitive legitimacy".[156] Scholars have advocated the Tribunal adopt such a standard when it came to controversial decisions, such as plea-bargaining. Scholars proposed that implementing this standard may, and indeed was the case above, ameliorate stakeholders' sense of frustration regarding otherwise unexplained practices.[157]

5.4.6. The President Applies Conditions to Release, defined as "Provisional Release'[158]

Throughout the interviews on UER in The Hague, interviewees were keen to highlight the limited resources of the Tribunal. This included when asked their opinions on the merit of conditional release, which was the general practice of prisoner-release throughout the European countries

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Belgium "shall comply" with see: http://www.icty.org/en/documents/member-states-cooperation [accessed 30/10/2019]

[150] See: http://www.icty.org/en/documents/member-states-cooperation [accessed 30/10/2019]

[151] See: http://www.icty.org/en/documents/member-states-cooperation

[152] Two Victims Associations one in Sarajevo, 06/11/2017 and one in the Republika Srpska 22 /11/2017 noted that the former President had informed them that early release was due to the weight of the enforcement states.

[153] This matter is discussed further in relation to Victims Sense of Justice, Chapter 8, s.8.6.3.

[154] See Chapter 3, s.3.5.5.

[155] A. Buchanan and R. Keohane, 'The Legitimacy of global governance institutions' in L. H. Meyer (ed.) *Legitimacy, Justice and Public International Law* (Cambridge University Press, 2009) at 49. See Chapter 3, s.3.5.5.

[156] M.C. Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) *The Academy of Management Review* 20(3) at 598. See Chapter 3, s.3.5.5.

[157] See Chapter 4, s.4.4.1; J.N. Clark, 'Judging the ICTY: Has it achieved its objectives?' (2009) *Southeast European and Black Sea Studies* 9(1-2): 123-142.

[158] Another legitimacy deficit of UER, the ramifications of which are discussed in the next chapter, was its unconditional nature. Normatively, given that Article 28 and the RPE do not provide a means for the President to impose conditions on the perpetrators, given that its original intention was for a pardon or commutation of sentence, this lack of a measure is not legally lacking legitimacy, but it was the unconditional nature of early release which was the crux of their perceived legitimacy deficit.

where the perpetrators are detained (s. 5.3.2).[159] Some interviewees in The Hague (those who had been there as the procedures were developed, in the early 2000s) were further asked if there had been any consideration given to the possibility of conditions being attached to early release: responses were mixed. One senior staff member immediately responded that conditions on release were not considered given the difficult relationship the Tribunal had with the countries in the FRY.[160] A judge, who had been on the Bureau at the time, gave a similar response. When it was noted that this was the general practice in national law, and that the Tribunal imposed conditions in cases of provisional release, the judge was quick to respond:

> there is nothing to reflect, basically what you have [in relation to national law] early release on parole … you are talking of people who are Germans or Swedish or French who live in that country ... and continue to live in that county, that is not the case … we will decide to grant him early release or not … if we grant him early release he goes back to wherever he goes and … we have no jurisdiction over him.[161]

The assertion that the Tribunal had "no jurisdiction" is valid but it downplayed the power of the President and the Tribunal. Another interviewee, when asked if conditions had ever been considered for early release gave an example where conditions had been applied – albeit under a provisional release.[162] In 2015, President Meron decided to utilise his Presidential powers to impose conditions on a convicted perpetrator's release.[163] This included effective house arrest and prohibited the perpetrator from communicating with anyone other than his counsel.[164] The President explained his decision to grant provisional rather than early release, or a commutation of sentence, as Drago Nikolić had not yet served two-thirds of his sentence. Nikolić was gravely ill,[165] and the interviewee noted "terminally" ill and it was Nikolić's illness that was the determining factor for his provisional release. The decision noted that, "it is essential that the Mechanism shows compassion and deference to the highest humanitarian principles".[166] This approach was affirmed by one judge interviewed who noted that, with regards to the Tribunal as a subsidiary body of the UN, albeit independent, its decisions were naturally "tempered with a measure of mercy".[167] It is further

[159] Krajišnik and B. Simić being imprisoned in the UK were eligible for automatic release at half of their sentence.
[160] Interview, Senior Staff Member, The Hague, 02/02/2017.
[161] Interview, Judge, The Hague, morning 30/01/2017.
[162] Interview, Staff Member, The Hague, 03/02/2017 – because this interview was held on the last day this point could not be raised in any interviews in The Hague.
[163] In addition to broadening his powers of discretion he overrode his decision of *The Prosecutor v. Mlado Radić*, 'A Decision on the Request for Provisional Release', 13 July 2005, para. 3, where he had determined that it was beyond the scope of the Statute to grant a perpetrator with a final conviction provisional release, cited para. 38, Nikolić Decision.
[164] Drago Nikolić, Provisional Release Decision, 20 July 2015, para. 44.ii(f).
[165] Drago Nikolić, Provisional Release Decision, 20 July 2015, paras. 29-33.
[166] Drago Nikolić, Provisional Release Decision, 20 July 2015, para. 34.
[167] Interview, Judge, The Hague, 23/01/2017.

reflected in the bilateral agreements of the enforcement states. All agreements include either a provision on the enforcement being in accordance with the "Standard Minimum Rules for the Treatment of Prisoners, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the Basic Principles for the Treatment of Prisoners"[168] which are UN Standards or invoke human rights standards more broadly, that treatment be "in accordance with the relevant human rights standards".[169] Interestingly, not all of the President's colleagues believed these humanitarian considerations required an early release. Two asserted that there was adequate treatment in European prisons to address their poor health.[170] The fact that the President was prepared to show mercy by allowing Nikolić to return home but at the same time prohibiting him from engaging with the outside world, provided a more balanced approach to early release of perpetrators of atrocity crimes. Imposing conditions indicated that relevant circumstances have been considered – the ill-health of the perpetrator but also the possible disquiet that could have ensued had Nikolić being released and greeted with a hero's welcome,[171] talked to the media and disparaged the court as others had on UER. The conditions imposed on Drago Nikolić[172] indicate that by July 2015 the President had learned lessons from the release of other high-profile perpetrators and was loath to repeat the mistake. The President granted provisional release from 24 July 2015 to 25 January 2016. The conditions imposed were strict; they included *inter alia*, 24-hour surveillance and a requirement for the authorities in Serbia to report daily to the President to confirm Nikolić's whereabouts. Significantly, Nikolić was not allowed to "discuss his case with anyone, including the media, other than his Counsel".[173] Prohibiting Drago Nikolić from almost all connection to the outside world was effectively a gagging order. It suggests that the President wished to keep this decision low-key and avoid disquiet in the region. The President imposed conditions to ensure that Nikolić returned home directly, without any reception awaiting him and that he remained there with minimal connection to the outside world. He was effectively held under house arrest other than to travel to the hospital to receive treatment.[174]

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[168] Bilateral Agreement Belgium.
[169] Bilateral Agreement, Austria
[170] Interview, Judge, The Hague, afternoon 30/01/2017 and Interview, Judge, The Hague, 23/01/2017 – although this judge noted that this was "one school of thought" and went on to present the other one, that perpetrators may be sent to die at home.
[171] See Chapters 6, 7 and 8.
[172] Drago Nikolić, 'Public Redacted Version of the 20 July 2015 Decision of the President on the Application for Early Release or other Relief of Drago Nikolić', made public 13 October 2015 – two days after his death in Serbia.
[173] Drago Nikolić, Provisional Release Decision, para. 44
[174] Drago Nikolić, Provisional Release Decision, para. 44 (v)(a) – "Nikolic shall remain within the confines of his place of residence in Banja Koviljaca … and – if strictly necessary for the purpose of medical treatment – the local hospital [REDACTED], apart from his travel to and from these locations and as specifically authorised by me".

This act of provisional, *de facto*, conditional release was more in line with the reasoning of the majority of interviewees in The Hague (below) and a number of interviewees in BiH. Although most interviewees in BiH were against early release, there were a number, notably judges, who initially did not object to early release *per se,* but went on to note that they were dissatisfied with its unconditional nature. This attitude was summed up best by one NGO interviewee. The interviewee's immediate response to his thoughts on early release was that it was "ordinary", but he then paused and took a more nuanced approach, as he considered the nature of the perpetrator and their return:

> the one problem I have with it [UER], the thing that undermines it: is it's a one-off decision and nothing you do or say has any bearing on it … I will give you a very concrete example … Plavšić admitted guilt … you say … 'she admits the crime and she feels terrible' and … because of that you … release her after two-thirds of the time served and the first thing she said after going out she said that the ICTY is a political court and that she didn't mean anything that she said. I don't think that that's acceptable … if you do it because of that and that turns out not to be true then you should arrest her and force her to serve the rest of the four years in prison.[175]

When the prospect of conditional release was raised, senior staff and some judges in The Hague were often keen to point out that the Tribunal had limited financial resources, an implication that, if they had the resources, conditions may have been imposed. The interviewees often coupled this argument by noting that the Tribunal had struggled with FRY states' cooperation. This argument did not satisfy many in BiH. The same interviewee above responded simply, "I don't think that because it's difficult you don't do it".[176] Indeed, many in BiH believed that the ICTY had the capacity to impose conditions, for if they could impose conditions for provisional release, why could they not do the same for early release? This belief was not unreasonable, as indeed the Tribunal had granted provisional release and these FRY states had returned the perpetrators (then accused) to The Hague as instructed. One interviewee who had worked in BiH with the ICTY, was told that the ICTY interviewees reiterated that they neither had a police force at their disposal to monitor conditions, nor the leverage with the States retorted dismissively. She argued that the ICTY had the backing of the EU and other major donors and had ample leverage to put pressure on the regional governments.[177] Indeed, a number of staff and judges at the Tribunal wished that practice of early release be conditional. One staff member said, speaking in his private capacity, when he had heard of the Special Court of Sierra Leone's practice of conditional release: "I thought, well that's how things should be done. Honestly, when I heard I thought, 'why don't we have that? We should have

[175] Interview, NGO, Sarajevo, BiH, 01/12/2017.
[176] Interview, NGO, Sarajevo, BiH, 01/12/2017.
[177] Interview, Independent lawyer, Sarajevo, BiH, 22/12/2017.

that".[178] One judge indicated that it had (as of January 2017) not being totally ruled out, as, when asked if he would like to have conditions attached, noted:

> I would appreciate to have that possibility. It is not in the Rules yet, it is not in the Statute yet, and we had many discussions also among the Judges if that would be a better way to put some pressure and to have the hand on them after their early release.[179]

The judge indicated, as did another member of staff, that imposing conditions had been considered. His double-qualification with "yet" was at variance with the majority of his colleagues and staff members who believe that the practice's unconditional nature was immutable. The grant of provisional release to Drago Nikolić, however, demonstrates that the President had room for manoeuvre if he so wished, and was prepared to use it. Furthermore, developments since February 2017 illustrate that he will be more ready to act when directed to do so by UN Member States. And, from the side of the UNSC Members, they were keen to prevent the President from having too much flexibility.

5.4.7. The President Concedes to his Colleagues

In April 2018 the President's broad discretionary powers were curtailed. When the enforcement of sentences became the responsibility of the Residual Mechanism, where no Bureau existed, the President was required to consult with the judges of the Sentencing Chamber who remained at the Mechanism. This reduced the number of judges the President could consult, and opened up the possibility that the President, alone, may decide early release. The Rules were amended in April 2018, and the President is now required to consult with two judges of the Mechanism when the judges who had imposed the sentence are no longer at the Mechanism.[180] This amendment prevents the portrayal of the decision-making process as a "one-man show".[181] The President's requirement to consult with other judges conforms with the reasoning of the Tribunal's first President who asserted that governance should not be delegated to "one individual".[182] Having more than one opinion will, at least in theory, make the decision more objective and should reduce accusations of individual arbitrariness.

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[178] Interview, Senior Staff Member, The Hague, 31/01/2017.
[179] Interview, Judge, The Hague, afternoon 30/01/2017.
[180] Public Redacted Version of the 20 April 2018 Decision of the President on the Early Release of Berislav Pušić, made public 24 April 2018, cited in para. 19, and Rules Amended April 2018.
[181] Interview, IGO Staff Member, Sarajevo, 01/12/2017.
[182] See s.5.4.4.

From the perspective of perpetrators of atrocity crimes, early release decisions read favourably up until February 2017. No publicly available early release decision had been rejected outright, other than where they had not yet served two-thirds of their sentence.[183] In October 2018, the President for the first time, at least publicly, denied outright the early release of a perpetrator, who had served two-thirds of their sentence, when the enforcement state was in favour of the early release.[184] Miletić been denied early release is significant for two reasons. First, despite the enforcement state being in favour of early release it was denied. Second, and most significantly, the President made explicit that the decision-making process was not a one-man show.

In the Miletić decision, a section was designated to the "Views of Judges at the Sentencing Chamber". This is the first time a section has been entitled in this way. Whether deliberate or not, it serves to highlight that the President is considering his colleagues. In this section the President asserted that the consultation process "forms a meaningful part of the President's assessment of applications", although the ultimate decision, he said, was at his "discretion".[185] This paragraph clarified that decisions were majority-based. Interestingly, this majority-basis was not stated by any of the interviewees in The Hague, who indeed emphasised that it was for the President to decide (see s.5.3.4). The Miletić decision noted that "it has been the general practice that the President will grant early release where … a majority are in favour … and, conversely, that the President will deny early release where … the Judges consulted … a majority are opposed, absent of compelling circumstances otherwise".[186] He supported this assertion by referencing 38 such early releases, whereby the other judges' views, in favour or against, are noted. However, none of these decisions make explicit that a majority decision is a general practice.

Additionally, this is the first time a decision has named another judge and directly cited him. [187] This decision makes clear to the reader that the President listens to his colleagues. Although he has the ultimate power to decide, speculatively he was, perhaps, keen to show that, as per the changes to

[183] In the cases of Bala, Blagojević, Kovač and Radić had been denied immediate early release despite having served two-thirds of their sentences. The President did not however reject outright their early release but rather set their early release for a number of months after the two-thirds standard.
[184] R. Miletić, Early Release Decision, 23 October 2018, para.8. The Finnish authorities supported Miletić's application for early release.
[185] R. Miletić, Early Release Decision, 23 October 2018 para. 44.
[186] R. Miletić, Early Release Decision, 23 October 2018 para. 44.
[187] Miletić's early release denied is a first time in the following ways: the President outright denies early release despite the enforcement state being in favour of it; and for the first time he cites and names his colleague who was against early release. The colleague named, Judge Agius, is now the President of the Residual Mechanism and has denied early release to Bralo, despite Bralo having served two-thirds of his sentence. See: Chapter 9, s.9.5.

the Rules, whereby two other judges were required to be consulted, he was seriously taking into account these judges' considerations as a matter of ongoing good practice.

5.4.8. The President Introduces Conditions

Just three months later, President Meron took more active steps than simply denying release. He formally introduced restrictive measures and granted Ćorić conditional release. President Meron clarified that he imposed these conditions taking into account UNSC recommendations to impose conditions on persons convicted by the ICTR.[188] As the Mechanism is responsible for enforcement of sentences of those convicted by both the ICTR and the ICTY, the President decided to extend this recommendation to perpetrators convicted by the ICTY. The conditions attached to Ćorić's release repeat the conditions Meron had imposed on Nikolić in July 2015, including an effective gagging order. The decision prohibited Ćorić, like Nikolić, from discussing his "case … including any aspect of the events in the former Yugoslavia that were the subject of his trial, with anyone, including the media, other than pro bono counsel".[189] Further, the President added that "Ćorić shall conduct himself honourably and peacefully in the community to which he is released, and shall not engage in … any political activities".[190] This action, silencing the perpetrator to the maximum possible extent, suggests that, by this time, the Tribunal has realised that UER had caused negative repercussions in the region (not only in Rwanda). The President also adopted measures similar to the Special Court for Sierra Leone, which has conditional release, with prohibiting orders on political participation and the condition for the released perpetrator not to attend any political meetings.[191] One Victims' Association who had met on several occasions with the Tribunal's Presidents stated that their association had recommended conditions being attached to early release, which the President had responded to as being beyond the Tribunal's control.[192] In June 2018, once the President had been directed to introduce conditions, by the UN, he did so. This action supports arguments proposed by observers such as Meernik and King, who have argued that the Tribunal has predominately prioritised the wishes of the international community (the UNSC Member States)[193] over its other stakeholders.[194] On this occasion, however, the wishes of the international community, a desire to

[188] Ćorić, Early Release Decision, 16 January 2019, para. 73 citing Resolution 2422 (2018) Adopted by the Security Council at its 8295th meeting, 27 June 2018.
[189] Ćorić, Early Release Decision, 16 January 2019, para. 78.
[190] Ćorić, Early Release Decision, 16 January 2019, para. 78(c).
[191] Residual Special Court for Sierra Leone, *Prosecutor Against Moinina Fofana / Allieu Kondewa*, Public Decision of the President on Application for Conditional Release, 11 August 2014, para. 49.iii.
[192] Interview, Victims' Association Director, Sarajevo, BiH, morning 06/11/2017.
[193] France, a Permanent Member of the UNSC 'encourage[d] the Mechanism to continue its discussions on the introduction of early release conditions", Record of UNSC meeting 8278M held 6 June 2018, UN Doc S/PV.8278.
[194] K.L. King and J.D Meernik 'Assessing the Impact of the ICTY: Balancing International with Local Interests while doing Justice' in B. Swart, A. Zahar and G. Sluiter (eds.) *The Legacy of the ICTY* (Oxford University Press, 2011) 7-54.

reduce negative repercussions created by UER, are in line with the wishes of stakeholders in the region itself. Twenty-five of the 57 BiH interviewees believed that conditional release would have lessened their sense of disappointment with UER. Additionally, many interviewees[195] reiterated that the return of unrepentant perpetrators was particularly difficult.[196] Thus, the introduction of these conditions, especially the prohibition of speaking to the media and re-entering political life, were in line with the above cited interviewee, and a significant number of the other interviewees. Now, as per the wishes of these interviewees, the President has the power to bring the perpetrator back to prison if he violates any of the stated provisions.

The impact of this recent change is unknown. However, between September–December 2017 interviewees in BiH overwhelmingly perceived UER as the standard in The Hague.[197] For example, when *Prlić et al* were convicted in November 2017, the media were already discussing their early release dates based on the two-thirds practice.[198]

This discrepancy between the actual practice and the perceived practice is important because it left many in BiH, who, surveys indicate, were broadly in favour of the Tribunal,[199] disappointed with the Tribunal for failing to live up to one of the stated purposes of sentencing perpetrators - retribution as a condemnation of the crimes (Chapter 7). Two interviewees believed that the Tribunal should conduct more outreach and highlight instances of denied UER. When one interviewee was informed that Kunarac had been denied UER, he responded that it was good to know that.[200] Another interviewee reflected that victims' communities might feel less aggrieved if it was known that not all perpetrators were automatically granted early release at two-thirds. It would confirm that the Tribunal are actually considering the implications of early release on the region and taking

[195] 23 of the 57 interviewees in BiH.
[196] See Chapter 7, s.7.5.
[197] No interviewees had heard that some perpetrators had being made to serve more than 2/3 of their sentence and eight interviewees referred to UER as the "rule" and another noted that there was an "automism" to it – Interview, Prosecutor, Brčko, BiH, 13/11/2017.
[198] The article is about the possibility that Prlić, after serving two-thirds of his sentence, might be released in three years while Pušić should be released immediately and probably will ask for some kind of compensation since he has been detained since 2004 and sentenced to 10 years. The same for Ćorić. Stojić and Petković should be out soon as well since they were sentenced to 20 years and were detained since 2004. see: https://www.klix.ba/vijesti/bih/prlic-moze-izaci-iz-zatvora-vec-za-tri-godine-ostali-vjerovatno-uskoro-na-slobodi/171129024 [accessed 31/12/2019].
[199] South East Europe Public Agenda Survey, cited in J.Meernik, 'Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia' (2005) *Journal of Peace Research* 42 (3): 271–289, at 274. Meernik noted that in 'Bosnia was 51% (the ICTY was the most trusted international institution in Bosnia), although within Republika Srpska, public trust was only 4% - referencing Information found at: http://www.idea.int/press/pr20020404.htm on 29 September 2004.
[200] Interview, NGO, Sarajevo, BiH, 16/10/2017.

perpetrators' crimes more seriously.[201] Actively demonstrating to the community that the UER is not a standard but that the President determines them on the perpetrator's merit would be more in line with the Tribunal's own standard of transparency, and may, in turn, increase the perception of better quality of decision-making, which Tyler asserted would increase sociological legitimacy.[202] As the following chapter will discuss, in addition to its unconditional nature, Presidents' assessment of perpetrators' demonstration of rehabilitation aggrieved stakeholders in BiH. This was in large part due to the apparent lack of rigour in Presidents' assessments; often perceived as a lack of concern about the repercussions UER of unrepentant perpetrators would have. However, a significant number of BiH interviewees identified one factor that the President could utilise to justify an early release, that of substantial cooperation with the Prosecutor. It was one way that the President could have acted to obtain legitimacy of the practice of early release (it is not unconditional) and a lesson that other ICTs and the ICC could learn from.

5.5. Substantial Cooperation with the Prosecutor

The President is required to consider substantial cooperation with the Prosecutor, Rule 125, and s.5.4.3 illustrated how, on occasion, consideration of this factor has been misapplied. However, interviewees in BiH indicated how this factor could be applied which would, in some cases, make the practice of early release legitimate. As a listed factor under the RPE, substantial cooperation is a legal rule, the first of Beetham's three conditions for any institution of power to be legitimate. Interview analysis from BiH found that there was a degree of this being a "shared belief" that could act as a "justification" [203] for this legal rule - Beetham's second condition. Beetham's condition of "express consent", is read to be the sociological legitimacy, and over one-third of these interviews[204] indicated that Beetham's third element could be fulfilled through a principled approach to consider substantial cooperation with the Prosecutor.

There were three principal reasons why persons, both in BiH and The Hague, believed that substantial cooperation with the Prosecutor could justify an early release: first, where cooperation led to convictions of other perpetrators; second, where cooperation tangibly assisted victims; and third, where cooperation had symbolic significance. These three reasons are largely victim and post-

[201] Interview, Independent with professional experience engaging with victim-witnesses in Srebrenica, Sarajevo, BiH, 21/12/2017.
[202] T. Tyler, 'Procedural Justice, Legitimacy and the Effective Rule of Law' (2003) *Crime and Justice* 30: 283-357 at 334. See Chapter 3, s.3.5.3.
[203] D. Beetham, *The Legitimation of Power* (Palgrave Macmillan, 2nd edition, 2013) at 16. See Chapter 3, s.3.3.
[204] Beetham's third condition, "express consent of the subordinate" cannot be measured here; it is simply proposed, based on the findings, as 18 of the 51 interviews stated along the line that cooperation with the prosecutor was the factor they would accord in determining a grant of release.

conflict-society-focused rather than perpetrator-focused. Thus, the use of this factor would be more in line with one of the Tribunal's cited list of achievements, that of "bringing justice to victims".[205]

The first of these, substantial cooperation, which assisted in bringing other perpetrators to justice, advanced the aims of the Tribunal, and was also perceived as a legitimate justification for early release by a number of interviewees in BiH.[206] Perpetrators providing significant cooperation has enabled the Tribunal to fulfil one of its core mandates, i.e. bringing "to justice" perpetrators of "widespread and flagrant violations of international humanitarian law".[207] This belief was described coherently by one interviewee: "Momir Nikolić he is a top witness to Srebrenica, he admitted guilt … he got twenty years, he served two-thirds, that's fine, he went out, whenever he's called in front of the Bosnian Court, … the ICTY, he says 'this is what I saw, this is what they said, they killed all these people.' I think that's fine".[208] Another interviewee noted that a good example of substantial cooperation with the Prosecutor as justifying early release is that of Erdemović, who had also acted as a prosecution witness.[209] As Chapter 8 (s.8.7.2) discusses, one of the core reasons why the Tribunal's practice of UER, although perceived by the majority of interviewees (with the exception of judges) in BiH as illegitimate, had not de-legitimatised the Tribunal itself was because of the perceived justice cascade which the Tribunal had triggered in BiH. This substantial cooperation was a legitimate factor to grant an early release, and the most important, as it advanced this justice cascade - it "can link to other … war criminals to be brought to justice ... [and] found guilty".[210] Early release granted on condition of testifying against others would have assisted victims and post-conflict society by bringing other perpetrators to justice.

The second reason why substantial cooperation with the Prosecutor could justify an early release was where it could assist in locating the disappeared. As of January 2019, the International Commission for Missing Persons (ICMP) estimate that there remain 10,000 missing persons from the war.[211] One prosecutor in the Republika Srpska linked the disclosure of mass graves to benefiting both victims and perpetrators themselves. He argued that "if they provide some information they can be rewarded and it is a form of satisfaction, and for them also it is catharsis".[212] The prosecutor

[205] ICTY website: https://www.icty.org/en/about/tribunal/achievements [accessed on 31/12/2019].
[206] 17 of the 18 interviewees who asserted that substantial cooperation was the most important factor to consider stated it was due to enabling testimony to be provided to hold other perpetrators to account.
[207] UNSCR 808, 22 February 1993.
[208] Interview, NGO, Sarajevo, BiH, 01/12/2017
[209] Interview, Defence Counsel, Republika Srpska, BiH, 13/11/2017.
[210] Interview, NGO, Republika Srpska, BiH, midday 24/11/2017.
[211] Website of the ICMP note that 70% of the approximately 31,000 missing persons created during the war have been accounted for.
[212] Interview, Prosecutor, Republika Srpska, BiH, 22/11/2017.

recognised two elements: practical merit, and just satisfaction to victims and, interestingly, perpetrators also. Providing information on the location of missing persons was of practical importance and was worthy of being "rewarded"; secondly, the word "satisfaction" followed by "for them" suggests that he was thinking of a form of "satisfaction" for the victims, or society who would be informed of the truth, recover the remains of their relatives and bury them. The notion that victims could gain some sense of satisfaction from this form of cooperation with the Prosecutor was shown first hand. One victim, when asked what could justify early release, stated that: "I would agree … with granting early release if the convicted war criminal gives the information where the remains of my dead brother who went missing in the camp are".[213]

Finally, substantial cooperation with the Prosecutor could have symbolic value, relevant for an ethnically-divided society.[214] It was reflective of a sense of society's catharsis: the value of condemning the crime and the motive behind the crime. The interviewee, an outspoken Serb peace-activist in the Republika Srpska, throughout the interview emphasised the glorification of war criminals who were seen as fighting for a heroic cause and whose crimes were downplayed. He argued, "I cannot justify any early release except maybe the release of the people who testify against their superiors or their brothers in blood".[215] As Chapter 7 discusses, there is a significant level of denialism, and this interviewee believed the record of atrocity crimes being produced by a "brother in blood" was valuable. Atrocities being factualised by a member of the perpetrator's own ethnic group would, this interviewee believed, be perceived as authoritative rather than the testimony of victims' ethnic group. This, he suggested, may be a means to counter the majority ethnic level of denialism, which could have assisted in one of the Tribunal's mandate under the UNSC Resolution, the restoration of peace – albeit a long-term objective.

5.6. Conclusion

Through doctrinal and empirical legal analysis, this chapter has answered the first two sub-research questions; it has outlined the law and practice of UER and the legal reasoning for it. In answering these questions, the chapter has shown how the practice of UER developed beyond the law's

[213] Interview, Victims' Association Republika Srpska, BiH, 21/11/2017. This interviewee referred back to Kolundžija, who has in fact been granted early release and lives in the same locality as this interviewee. This interviewee believed that Kolundžija did know where the mass graves were, and thus possibly his brother's remains, and was disappointed that the Tribunal had not used the factor of "substantial cooperation" to incentivise Kolundžija to disclose this information. Conditioning release on this factor would have tangibly assisted this victim, and others, who would have been able to bury their dead.

[214] F. Beiber, *Post-War Bosnia: Ethnicity, Inequality and Public Sector Governance* (UNRISD and Palgrave Macmillan, 2006) and C. Grewe and M. Riegner, 'Internationalized Constitutionalism in Ethnically Divided Societies: Bosnia-Herzegovina and Kosovo Compared' in A. von Bogandy and R. Wolfrum (eds.) *Max Planck Yearbook of United Nations Law*, 15 (2011) 1-64.

[215] Interview, NGO, Republika Srpska, BiH, morning 24/11/2017.

original intention. This was primarily due to the broad powers of the President under the Statute, coupled with the Presidents' reading of the four factors under the RPE in favour of the perpetrators (save in few exceptional cases): the gravity of the crime factor was read narrowly, the factor of similarly-situated prisoners was read broadly, and, in a few cases, substantial cooperation with the Prosecutor was simply misapplied – guilty pleas should not have been considered by the President, as the RPE denote it is the "prisoners' substantial cooperation with the Prosecutor, so only cooperation post-conviction should have been considered.

Based on these findings, and interview data, the chapter has argued that the practice of UER lacked normative (legal) legitimacy in two ways. First, under a strict application of the black letter law,[216] UER was originally conceived of as an exception, but became the dominant practice. Second, the factors guiding the determination of an early release were interpreted too broadly in favour of the perpetrators of atrocity crimes. These legitimacy deficits meant that the practice lacked sociological legitimacy. UER was perceived as inappropriate, considering the gravity and nature of atrocity crimes, the apparent blanket application of the criterion of "similarly-situated prisoners",[217] and the overly generous approach taken by the President. The last two perceived normative (legal) legitimacy deficits also gave rise to a procedural justice deficiency – the perceived fairness and quality of the decision-making process.[218] This practice was widely (with the exception of BiH judges) perceived as illegitimate, though as Chapters 7 and 8 will discuss, it has not delegitimised the Tribunal overall. Nevertheless, the practice has created a "blackspot"[219] for the Tribunal.

In highlighting these controversies, this chapter appeals to future *ad hoc* international criminal tribunals to take more seriously early release and for it to be communicated as such. The Tribunal's lack of communication with the region, not explaining the reasoning behind early release, has done

[216] See Chapter 3, s.3.2. Based on Beetham's three conditions of legitimacy - "power is acknowledged as legitimate to the extent that: it [has] legality, [holds] normative justifiability and [has] legitimation" in D. Beetham 'Revisiting Legitimacy, Twenty Years On' in J. Tankebe and A. Liebling (eds.) *Legitimacy and Criminal Justice: An International Exploration* (Oxford University Press, 2013) at 19; and D. Bodansky, 'The Legitimacy of International Governance: A coming challenge for International Environmental Law' (1999) *The American Journal of International Law* 93(3): 596-624 at 603.

[217] Although the consideration of "similarly-situated prisoners" appeared to be applied in a blanket manner, there have been occasions when the President has indicated that the typology of the perpetrator could distinguish them and thus they would not be considered as "similarly-situated" – Kovač decision is important because, in addition to being an example of a lack of systematic approach to early release, it demonstrates the power of the President to distinguish the typology of the perpetrator at his broad discretion, according to his own morals; which may have been seen as sociologically legitimate, discussed s.5.4.2. – a shared value, whereby the gravity of the crime was considered more thoroughly.

[218] T.R Tyler, 'What Is Procedural Justice - Criteria Used by Citizens to Assess the Fairness of Legal Procedures' (1988) *Law and Society Review* 22: 103 discussing G.S. Leventhal, "What Should Be Done with Equity Theory?," in K. J. Gergen, M.S. Greenberg, and R. H. Weiss (eds.) *Social Exchange: Advances in Theory and Research* (Plenum, 1980). See Chapter 3, s.3.5.3.

[219] Interview, Individual currently working in an independent state institution with extensive work experience in IGOs, Sarajevo, BiH, 20/12/2017.

a disservice to the most widely-stated purposes of sentencing, moral condemnation of the crime and the criminal (Chapter 7), and in doing so has disappointed one of its key stakeholders, victims' communities (Chapter 8). The UER of unrepentant perpetrators has been at the heart of this rupture between the stated purpose of punishment and its termination, which has created a legitimacy deficit at the Tribunal. UER was an evident gap between the rhetoric and the reality of punishment. The early release decisions widely cited the rehabilitation of perpetrators as a ground for the grant of UER.[220] Thus, how the President determined this is key to understanding how this legitimacy deficit arose and possibly how it can be ameliorated.

[220] That the perpetrator has served two-thirds of their sentence and thus similarly-situated to other prisoners is the most dominate factor cited, second is their demonstration of rehabilitation.

Chapter 6: Rehabilitation of Perpetrators of Atrocity Crimes

6.1 Introduction

Rehabilitation was accorded the least weight in sentencing perpetrators at the ICTY.[1] Deterrence and retribution were given primacy due to the gravity of the crimes.[2] However, rehabilitation was *prima facie* significant in many of the early release decisions: a "demonstration of rehabilitation" weighed in perpetrators' favour in the grant of UER in 33 of the 54 decisions.[3] This chapter argues that the Presidents' assessment of perpetrators' rehabilitation lacked both normative and sociological legitimacy. On the basis of document analysis and interview feedback from both The Hague and BiH, this chapter continues with the analysis of the Presidents' early release decisions (Chapter 5), the focus now on the demonstration of rehabilitation which the President is required to consider under the Rules and Procedure of Evidence (RPE).[4] The decisions appear to lack meaningful deliberation as to what rehabilitation for these types of perpetrators and their connected crimes could or should encompass to warrant their return to society. This normative legitimacy deficit was a significant reason why both Tribunal and BiH stakeholders perceived UER as an illegitimate practice.

The chapter begins by briefly setting out the general parameters of rehabilitation for "ordinary criminals"[5] which International Human Rights Law (IHRL) obliges states to make the primary objective of imprisonment.[6] It raises the matter that, in many cases and especially those of, indirect perpetrators[7] of atrocity crimes differ to that of ordinary criminals.[8] It discusses the different factors

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[1] *Kunarac et al*, Trial Chamber Judgement, 22 February 2001, "The Trial Chamber is therefore not convinced that rehabilitation is a significant relevant sentencing objective in this jurisdiction", para. 844.

[2] B. Holá, A. Smeulers and C. Bijleveld, 'Is ICTY Sentencing Predictable? An Empirical Analysis of ICTY Sentencing Practice' (2009) *Leiden Journal of International Law* 22(1): 79–97, at 82.

[3] The most recent grant of early release, to Ćorić, 16/01/2019 has been released with considerable conditions attached. In the grant of 33 of the 54 UER's the President determined that this was in part due to their "demonstration of rehabilitation". Through the empirical analysis the chapter identifies how this in itself created (normative) (legal) legitimacy of exercise challenges, and secondly, from the normative (moral) dimension of legitimacy was lacking given the nature of the atrocity criminal. Based on its interview analysis the chapter discusses what a demonstration of rehabilitation could encompass to justify an early release, again, emphasising early release as conditional.

[4] The previous chapter considered the President's consideration of the other statutory factors as well as identifying patterns and changes in the Presidents' decision-making process overall.

[5] M. Harmon and F. Gaynor, 'Ordinary Sentences for Extraordinary Crimes' (2007) *Journal of International Criminal Justice* 5(3): 683-712.

[6] International Covenant on Civil and Political Rights, 1966, Article 10(3) - "The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation"; and UN Standard Minimum Rules for the Treatment of Prisoners 1955, Rule 65 – "The treatment of persons sentenced to imprisonment or a similar measure shall have as its purpose, so far as the length of the sentence permits, to establish in them the will to lead law-abiding and self-supporting lives after their release".

[7] See Chapter 5, s.5.4.2, noting the difference on direct and indirect perpetrators. Another example discussed in detail in this chapter is the significance of the difference between instigators of the crimes, those with command responsibility who do not physically commit the crimes and their level of engagement: instigators initiate the crime whereas those with command responsibility fail to act or fail to punish.

debated in post-conflict justice literature[9] which may be considered as rehabilitation appropriate for perpetrators of these crimes: notably remorse. It also notes the challenges which have been raised as to the suitability of remorse (s.6.7) and the connected act of forgiveness, again due to the nature of the crimes.

Two examples of what Holá *et al* have described as the "superficial"[10] approach taken by the Tribunal's Presidents in their assessment of perpetrators' rehabilitation are discussed (s.6.3), which demonstrate that the Presidents' determinations of rehabilitation, in these instances, fell short of the standard of procedural fairness, adherence to clear procedure.[11] The next section draws on the interview data in The Hague to explain why this apparently superficial approach was taken and responds to the reasons presented (s.6.4). Scholars have questioned the legitimacy of the Tribunal's Presidents' consideration and determination of a demonstration of rehabilitation.[12] This chapter contributes to this literature as it discusses perceptions of stakeholders at the Tribunal itself and in BiH who echo Holá *et al*'s critiques. In doing so, it explores how stakeholders perceived the UER decisions as lacking in normative legitimacy (s.6.5).

Interview analysis in BiH indicates that the perpetrators' lack of remorse for the crimes they were convicted of was a key element confirming the perception that the practice of UER was illegitimate. This finding, therefore, addresses the sub-research question on how outside stakeholders perceive UER, as it highlights a factor which shaped their perception of the practice being illegitimate. Within the thesis' framing of legitimacy, one factor is that legitimacy of the law depends on shared beliefs[13] between law's decision-makers and its stakeholders, and that institutions wish to be perceived as legitimate.[14] Accordingly the chapter identifies and discusses three key issues at the core of the legitimacy deficit of the Presidents' determinations of "evidence of rehabilitation" weighing in favour of their UER (s.6.6). This section, firstly, outlines certain practices which stakeholders regarded as clearly not evidencing a perpetrator's rehabilitation. Secondly, it identifies the possible

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[8] A. Smeulers (ed.) *Collective Violence and International Criminal Justice – Towards an Interdisciplinary Approach* (Intersentia, 2010) 175-206 and M. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, 2007) at 25.
[9] P. Gobodo-Madikizela, 'Remorse, Forgiveness and Dehumanization: Stories from South Africa' (2002) *Journal of Humanistic Psychology* 42(1): 7-32.
[10] B. Holá, J. van Wijk, F. Constantini, and A. Korhonnen, 'Does Remorse Count? ICTY Convicts' Reflections on Their Crimes in Early Release Decisions' (2018) *International Criminal Justice Review* 28(4) 349-371 at 365; and A. Merrylees, 'Two-Thirds and You're Out: The Practice of Early Release at the ICTY and ICC in Light of the Goals of International Criminal Justice' (2016) *Amsterdam Law Forum* 8(2): 69-76 at72.
[11] See Chapter 3, s.3.5.2.
[12] See Chapter 4, s.4.5.3.
[13] D. Beetham, see Chapter 3.
[14] R. Barker and M. Suchman, see Chapter 3.

means - genuine remorse - by which rehabilitation can be demonstrated. Thirdly, it recognises, as does the literature,[15] that there are severe difficulties in actually evidencing remorse. This last point derives from the unique nature of the atrocity crimes committed, the complexity of perpetrators' *mens rea* and the nature of the society to which they return. This complexity, rather than making redundant the factor of rehabilitation and an accompanying requirement for a perpetrator to evidence it, makes a rigorous assessment of rehabilitation critical when perpetrators of atrocity crimes are set to return to post-conflict society. Thus, the significance of remorse is discussed (s.6.7).

6.2. Rehabilitation as a Purpose of Punishment and Imprisonment

Rehabilitation, on occasion, was explicitly rejected as a purpose of punishment at the Tribunal. Some judges reflected that "in light of the serious nature of the crimes committed under the Tribunal's jurisdiction, [rehabilitation] has not played a predominant role in sentencing".[16] However, this attitude was not taken by all judges. At certain junctures, consideration was given not only to their mandate of bringing justice to perpetrators and the gravity of their crime, but the mandate of restoration and maintenance of peace.[17] In the Delalić judgement, judges argued that all purposes of punishment should be considered. They warned that "if retribution were to be taken as the only reason for punishment, this could be counter-productive … given the paramount objective of the Security Council, namely the restoration and maintenance of peace on the territory of the former Yugoslavia".[18] Thus, rehabilitation, although overall accorded less significance at sentencing was, at times, considered as a purpose of punishment.

Beyond sentencing rehabilitation is not only a factor but under IHRL it should be the primary purpose of imprisonment.[19] All perpetrators convicted by the ICTY were imprisoned in states bound by IHRL,[20] a point reiterated in their bilateral agreements with the Tribunal.[21] Yet, there is no

[15] R. Zhong, M. Baranoski, N. Feigenson, L. Davidson, A. Buchanan and V. Zonana, 'So You're Sorry? The Role of Remorse in Criminal Law' (2014) *Journal of American Academy of Psychiatry and Law* 42(1): 39-48 at 47.
[16] *Popović et al*, Trial Chamber Judgment, 10 June 2010, para. 2130 citing *Krajišnik* Appeal Judgment, 27 September 2006, para. 806; *Mucić et al*, Appeal Judgment, 20 February 2001, para. 806.
[17] UNSCR 808, 22 February 1993. In addition to punishing perpetrators the ICTY was set the task of contributing to the restoration and maintenance of peace.
[18] *Delalić et al*, Judgment, 16 November 1998 at para. 1231 – cited (incorrectly) in G. Vermeulen and E. de Wree, *Offender Reintegration and Rehabilitation as a Component of International Criminal Justice?* (Maklu Publishing, 2014) at 77.
[19] ICCPR 10(3) and UN Minimum Rules for the Treatment of Prisoners 1955.
[20] I.M. Weinberg de Roca and C. Rassi, 'Sentencing and Incarceration in the Ad Hoc Tribunals' (2008) *Stanford Journal of International Law*, 44(1): 1-62 at 45.
[21] All bilateral agreements had a clause of the following nature; 'imprisonment … shall be in accordance with relevant human rights law standards', see Austria 1999 agreement - and that the Tribunal was to oversee imprisonment

universally accepted definition of rehabilitation[22] though scholars and the general practice of rehabilitation services indicate "rehabilitation … ultimately aims at enabling the [individual] to socially function in a way that is acceptable to both himself/herself and society."[23] This understanding of rehabilitation encompasses two subjects – the perpetrator and society. Society cannot be a subject of rehabilitation but the perpetrators' relationship with it can be. These two subjects are reflected in the IHRL principles and standards underlying the normative character of rehabilitation and, consequently, how it should be assessed. Further, all enforcement states are party to the International Covenant on Civil and Political Rights (ICCPR) which requires of states that the "essential aim" of the penitentiary system shall be prisoners' "reformation and social rehabilitation".[24] These requirements consist of two dimensions. The first is internal - "their reformation" is personal and as such implies a change of mind-set, "making good".[25] The second is external - "social rehabilitation" relates to society and positions the perpetrator in relation to that society, "causing harm to members of the public is lessened".[26] IHRL obliges states to prepare the perpetrator to return to society: "the treatment of prisoners should emphasize not their exclusion from the community, but their continuing part in it".[27] Thus, from the "beginning of a prisoner's sentence consideration shall be given to his future after release".[28]

It is essential to emphasise that IRHL's two dimensions of rehabilitation (the perpetrator's character and their relationship with society) differ in the context of atrocity crimes.[29] Some scholars have argued that perpetrators of atrocity crimes are fundamentally "ordinary people, like you and me, who commit genocide and mass killings".[30] Waller makes this assertion to emphasise that atrocity crimes happen in a context, whereby ordinary people, who are not necessarily violent, commit heinous crimes. This has implications for rehabilitation: how can one determine rehabilitation for

[22] J.M. Kelder, B. Holá and J. van Wijk, 'Rehabilitation and Early Release of Perpetrators of International Crimes: A Case Study of the ICTY and ICTR' (2014) *International Criminal Law Review* 14(6): 1177-1203.
[23] A. M. van Kalmhout and l. Durnescu, 'European Probation Service System. A Comparative Overview' in A.M. van Kalmthout and l. Durnescu (eds.) *Probation in Europe* (Wolf Legal Publishers, 2008) 1-49 at 28 cited in J.M. Kelder, B. Holá and J. van Wijk, 'Rehabilitation and Early Release of Perpetrators of International Crimes: A Case Study of the ICTY and ICTR' at 1185.
[24] ICCPR, 1966, Article 10(3) emphasis added.
[25] S. Maruna, *Making good: How ex-convicts reform and rebuild their lives* (American Psychological Association, 2001) referenced in Tony Ward, 'Human Rights and Dignity in Offender Rehabilitation' (2011) *Journal of Forensic Psychology Practice* 11: 103-123 at 112.
[26] T. Ward, 'Human Rights and Dignity in Offender Rehabilitation' (2011) *Journal of Forensic Psychology Practice* 11: 103-123 at 112.
[27] UN Standard Minimum Rules for the Treatment of Prisoners, 1955, Rule 61.
[28] UN Standard Minimum Rules for the Treatment of Prisoners, 1955, Rule 61 and see Tony Ward, 'Human Rights and Dignity in Offender Rehabilitation' (2011) *Journal of Forensic Psychology Practice* 11: 103-123 at 112.
[29] Given the distinct nature of the perpetrator and the society to which they return, this chapter does not examine the broader and differing definitions of rehabilitation. Holá and others have undertaken this task and this thesis does not need to duplicate it; the empirical research emphasized the notion of remorse with rehabilitation and thus this element is a significant focus of this chapter.
[30] J. Waller, How *Ordinary People Commit Genocide and Mass Killing: Becoming Evil* (Oxford University Press, 2007) at 20.

atrocity perpetrators who were "law-abiding citizens … in peacetime"?[31] Alongside these perpetrators, ordinary people who commit heinous crimes in a context, there are perpetrators who instigate crimes, and this thesis argues along with others,[32] that these perpetrators are different to ordinary people (s.6.6.1). Rehabilitation in these instances poses difficulties in determining (s.6.6.1 and s.6.6.2) the extent to which these perpetrators are personally reformed. Secondly, in relation to crimes in context, the crimes, of "malevolent human evil" were "perpetrated in times of collective social unrest, war, mass killings, and genocide".[33] Thus, in terms of society, and the societal element of rehabilitation, they are not necessarily considered deviant[34] at the time of the crime, and not necessarily upon return to society, as many in that society still endorse the ideology and animosities which fuelled the war.[35] This context poses challenges for an assessment of their "social rehabilitation".[36] Should the President and his colleagues examine the perpetrators' readiness to enter the society in the FRY – and how could they do this? Finally, perpetrators of atrocity crimes, as individuals, are not homogenous, there are different typologies,[37] whose rehabilitation may encompass different elements (s.6.4.4 and s.6.6). Before turning to challenges the Presidents faced in considering perpetrators' demonstration of rehabilitation and consequent sociological legitimacy deficits perceived in the Presidents' assessment of rehabilitation (s.6.4-s.6.6), the following section (s.6.3) outlines how the Presidents' written decisions lacked normative (legal) legitimacy.

6.3. The Practicalities of the Presidents' Consideration of Perpetrators' Rehabilitation

This section demonstrates that the Presidents' written consideration of rehabilitation lacked rigour and generously granted the perpetrator the benefit of the doubt. A perpetrator's evidence of a demonstration of rehabilitation was based on information provided by the enforcement state, the perpetrator themselves, and/or the perpetrator's counsel.[38] With this evidence the President was to determine, in consultation with the judges, the extent to which the perpetrator had demonstrated rehabilitation. The Practice Direction on the Procedure for the Determination of Applications for

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[31] D. Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law' in S. Besson & J. Tasioulas (eds.) *The Philosophy of International Law* (Oxford University Press, 2009) at 575.

[32] For a collection of arguments see: in A. Smeulers (ed.) *Collective Violence and International Criminal Justice – Towards an Interdisciplinary Approach* (Intersentia, 2010).

[33] J. Waller, *How Ordinary People Commit Genocide and Mass Killing: Becoming Evil* (Oxford University Press, 2007) at 14.

[34] M. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, 2007) at 32.

[35] B. Holá et al, 'Does Remorse Count? ICTY Convicts' Reflections on Their Crimes in Early Release Decisions' at 352.

[36] ICCPR, Article 10(3).

[37] A. Smeulers and B. Holá, 'ICTY and the Culpability of Different Types of Perpetrators of International Crimes' in A. Smeulers (ed.) *Collective Violence and International Criminal Justice – Towards an Interdisciplinary Approach* (Intersentia, 2010) 175-206 and M. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, 2007) at 25. High-level political instigators of the crimes were not direct killers, but were instigators; others were direct perpetrators; others failed to prevent or punish their subordinates, the direct perpetrators.

[38] The Early Release decisions usually note that the President has received the application from the enforcement state, as a direct petition from the perpetrator or the perpetrator's counsel.

Pardon, Commutation of Sentence and Early Release of Persons Convicted by the International Tribunal[39] provides the President with the option to "hear him or her [the perpetrator] either through written submissions or, alternatively, by video or telephone-link".[40] This PD *prima facie* allows for a range of evidence of rehabilitation to be collated and enables the President not only to examine the evidence but to cross-examine the perpetrator in his determination. A comprehensive critique of the Tribunal Presidents' consideration of rehabilitation has been undertaken by others.[41] Holá *et al*. have provided a detailed analysis of factors by which the President determined perpetrators' apparent personal reformation, *inter alia*, their behaviour in prison, such as their attitudes towards fellow prisoners, prison staff and their activities[42] and their reflections on their crimes.[43] This section complements their work based on this research's empirical legal analysis and interview data. It adds another level to their examination of the normative legitimacy of the Presidents' consideration of rehabilitation (its legality and the standard of procedural fairness – the quality of decision-making).[44]

6.3.1. Evidence of Rehabilitation Considered by the President

The wording of the PD suggests that the Tribunal presumed that the enforcement state would, throughout the period of detention, monitor the behaviour of the perpetrators. The PD orders the Tribunal's Registrar to "request reports and observations from the relevant authorities … as to the behaviour of the convicted person during his or her period of incarceration".[45] The word "during" denotes an ongoing timeframe, that of "the period of incarceration". It also enables the Registrar to "request … any psychiatric or psychological evaluations prepared on the mental condition of the convicted person during the period of incarceration".[46] At the same time, this instruction implies that … psychiatric or psychological reports were not mandatory for the enforcement state to prepare. Nevertheless, they had been foreseen. President Robinson in the case of Rajić's application for early release stated his interpretation of para. 3(b) as "envisage[ing] reports from the Enforcement States regarding the psychological condition of the convicted person during his incarceration".[47] Yet, despite noting his interpretation that such reports should be prepared, he accepted that none had been prepared by the enforcement state and made his decision on a

[39] *Hereinafter* the 'PD' original April 1999, updated 2009 and September 2010.
[40] Practice Direction on Pardon, Commutation of Sentence and Early Release, 'Participation of the Convicted Person', para. 5.
[41] See Chapter 4, s.4.5.
[42] J.M. Kelder, B. Holá and J. van Wijk, 'Rehabilitation and Early Release of Perpetrators of International Crimes: A Case Study of the ICTY and ICTR' at 1187.
[43] B. Holá et al, 'Does Remorse Count? ICTY Convicts' Reflections on Their Crimes in Early Release Decisions' 349-371.
[44] See Chapter 3, s.3.5.2.
[45] Practice Direction on Pardon, Commutation of Sentence and Early Release, para. 3(b)
[46] Practice Direction on Pardon, Commutation of Sentence and Early Release, para. 3(b)
[47] Rajić, Early Release Decision, 22 August 2011, para.19.

demonstration of rehabilitation based solely on the perpetrator's good behaviour in prison. Reading this decision, the President appears to have acted passively. He clearly recognised the proposed good practice of having a psychological report prepared but did not use his power under the PD to request "any other information that the President considers relevant".[48]

Despite the Presidents' capacity under the PD to request detailed information from the enforcement state, including hearing directly from the perpetrator,[49] the document analysis, as in *Rajić* above, supports Holá *et al*'s argument that the Presidents took a "superficial"[50] approach in their assessment of the perpetrator's rehabilitation. This superficial approach poses a simple legitimacy challenge in terms of the procedural fairness standard.[51]

6.3.2. Evidence of Rehabilitation Not Considered by the President

There are two examples of Presidential lack of rigour which fall within the "distant court" critique of the Tribunal posed by some scholars, who criticise the Tribunal for neglecting its stakeholders in the FRY.[52] The first example was in the case of Plavšić, whereby the President gave significant weight to a retracted statement of remorse.[53] The President cited Plavšić's statement of remorse in her guilty plea (made seven years earlier) as evidence of her rehabilitation.[54] His reference to this statement indicates that he lacked the knowledge that earlier in the year, January 2009, she gave a public interview retracting this statement of remorse.[55] Although the President had considered other information provided by the enforcement state, including two psychologist reports,[56] his determination indicates that he was unaware of this development despite it attracting considerable attention in the media, including the English language media, notably the Institute of War and Peace Reporting.[57]

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[48] More unfortunate was that on this occasion the Prison Directorate noted that Rajić denied responsibility for the crimes for which he was convicted. However, President Robinson took Rajić's at his word - that he accepted the sentence of the Tribunal, over that of the Prison Directorate.
[49] Practice Direction on Pardon, Commutation of Sentence and Early Release, para. 11.
[50] B. Holá et al, 'Does Remorse Count? ICTY Convicts' Reflections on Their Crimes in Early Release Decisions' at 365.
[51] See Chapter 3, s.3.5.2.
[52] K. King and J. Meernik, 'Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia: Balancing International and Local Interests While Doing Justice' in B. Swart, A. Zahar and G. Sluiter (eds.) *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press, 2011) 7-54. See Chapter 4, s.4.3.
[53] This case was widely noted by interviewees in BiH and consequently is discussed throughout this chapter.
[54] Noted in Chapter 3, this reference also lacked normative (legal) legitimacy given that the guilty plea had already been accounted for as a mitigating factor in the sentencing.
[55] Swedish TV interview cited Choi, 'Early Release under International Criminal Law' 1787 and see: https://www.slobodnaevropa.org/a/1381132.html
[56] Plavšić, Early Release Decision, 14 September 2009.
[57] https://iwpr.net/global-voices/plavsic-reportedly-withdraws-guilty-plea [accessed 11/11/2019].

The President repeated the apparent lack of knowledge of the societal context within which UER occurred nine months later as he granted Sikirica UER.[58] In this decision he referred to Sikirica's guilty plea as evidence of his rehabilitation and supported his reason for doing so by referencing Plavšić's statement of remorse at sentencing being weighed in favour of her UER. This positive reference, which had very openly been retracted on her return to Belgrade, suggests that no one had informed the President of this controversy surrounding her return. A senior staff member at the Tribunal when asked about the reference to Plavšić's remorse in the Sikirica early release decision, responded that "he might not have known to be honest; it might not have come to his attention at the time the decision was rendered".[59] The interviewee's comment illustrated the Tribunal's shortcoming of not keeping abreast of the situation in the region; or if one part of the Tribunal was aware of the development, a shortcoming in internal communication. Ultimately, however, the President had the power to request additional information to keep abreast of regional current affairs and this lack of knowledge implies a lack of rigour as the President neglected to utilise this provision.

In addition to neglecting to take into account the societal context to which the perpetrator was due to return, on reading the determinations alone, the Presidents' decisions lacked rigour as they generally declined to apply provisions of the black letter law to interrogate further the perpetrator's evidence of rehabilitation. Other than under the Presidencies of Kirk-McDonald, Jorda and, on one occasion, Meron (during his first Presidency), there is no visible questioning of enforcement state reports or perpetrators' submissions.[60] Until recently, on occasions where there have been unfavourable reports of the perpetrator by the prison or enforcement state, the Presidents have either considered them "outdated"[61] or declined to accord the prison's opinion too much weight in the absence of an expert report. In the case of D. Tadić, the prison's submission suggested that he expressed no remorse for his crimes.[62] Although President Pocar referenced the prison's submission he declined to accord it "great weight in the absence of any psychological report".[63] As noted, the President had the power to request further information, which could have been, on this occasion, a psychological report to determine whether Tadić was remorseful; but he declined to do so. Holá *et al.* described cases, where perpetrators appear to lack remorse, as incidences of the "President

[58] D. Sikirica, Early Release Decision, 21 June 2010, para. 14.
[59] Interview, Senior Staff Member, The Hague 02/02/2017.
[60] The determinations show no record of the President requesting clarifications, despite having the power to do so.
[61] R. Kovač, Early Release Decision, 3 July 2013, para. 25.
[62] D. Tadić, Early Release Decision, 17 July 2008, although it was in favour of his release - conditional upon his deportation to Serbia, para. 8.
[63] D. Tadić, Early Release Decision, 17 July 2008, para. 16.

sweep[ing] … concerns under the carpet and … not making any further inquiries".[64] By doing so the President provided the benefit of the doubt to a perpetrator who had (in addition to having been found guilty of atrocity crimes) lied under oath,[65] over the findings of the relevant authorities of the enforcement state.

The case of "outdated" information being rejected by the President and an apparent lack of further investigation was put to one interviewee, a judge at The Hague, and received a strong reproach. The judge argued that there was "nothing outdated" in the decisions and asserted "I know cases where we required more information and other cases where we had enough".[66] The very real and discretionary power of the President is highlighted by this judge's statement. It suggests that judges too had the capacity to ask for more; nevertheless, his statement was balanced by the fact that he began his sentence: "The President decides".[67]

There have other decisions whereby the President emphasised one set of information favourable to the perpetrator over negative reports on the perpetrator. In the case of Tarčulovski, in spite of the psychological report explicitly noting that he lacked remorse for his crimes,[68] the President decided to give greater weight to the prison authority's report which stated that Tarčulovski appeared not to pose a societal threat.[69] Although the President does consider the negative psychological report, he appears to accord it less significance as he granted Tarčulovski UER.

6.3.3. A Naïve Benefit of the Doubt

At times, the President applied a naïve benefit of the doubt to the perpetrator as he appeared to accord greater weight to their evidence, over evidence to the contrary. For example, President Robinson concluded in the case of B. Simić that his intention "to return to the practice of medicine in order to contribute to his community" outweighed concerns that a number of B. Simić's statements appear to "attempt to attenuate his individual criminal responsibility".[70] There is no apparent reflection on whether Simić's downplaying of his criminal responsibility would make him an unsuitable doctor on his return to his community. In the UK, where B. Simić was serving his sentence, a conviction for war crimes would be required to be declared and returning to medical

[64] B. Holá *et al*., 'Does Remorse Count? ICTY Convicts' Reflections on Their Crimes in Early Release at 359 – in the cases of Radić and Martinović.
[65] With the exception of those who had pled guilty.
[66] Interview, Judge, The Hague, morning 30/01/2017.
[67] Interview, Judge, The Hague, morning 30/01/2017.
[68] Decision of the President on the Early Release of Johan Tarčulovski, 8 April 2013, para. 20.
[69] Decision of the President on the Early Release of Johan Tarčulovski, 8 April 2013, para. 20.
[70] B. Simić, Early Release Decision, 15 February 2011, para. 29.

practice would not be without controversy.[71] Statements which expressed the belief that a perpetrator who had not fully accepted the finding of personal guilt would make a contribution to "his community", signify the apparent disconnect the Tribunal had with the region. Simić was found guilty of the crimes of persecution as the highest civilian leader in the Serb-run administration: effectively, he contributed to the ethnic cleansing of the area. Over 20 years later this small town remains ethnically cleansed and the Bosniak population are now in the minority.[72] Simić's contribution to the community, and the disputed nature of that contribution, was illustrated during the fieldwork. In autumn of 2017 Simić was appointed as the Director of a Medical Centre in Bosanski Šamac, raising controversy in the national media.[73] One interviewee in the BiH Federation (not from the local area) raised this independently and reflected, "would victims feel comfortable coming to that health centre now he is the director?"[74] The President's decision in the case of Simić indicates a lack of rigour as the President gives no consideration as to what an effective lack of remorse would be for a doctor who returns to an ethnically divided small town.

In 29 of 54 decisions,[75] the President considers perpetrators' return to their society under their demonstration of rehabilitation. This statistic indicates that the Presidents were aware of this element of rehabilitation under IHRL[76] but rather did not consider it consistently or with any rigour. As above, responsibility for preparing the perpetrator to return to society is not the responsibility of the Tribunal, as the bilateral agreements stipulate that conditions of imprisonment will be the responsibility of the enforcement state.[77] Nevertheless, it is the responsibility of the President to consider whether the perpetrator has evidenced a demonstration of rehabilitation to the extent that

[71] The UK General Medical Council lists a number of convictions which medical students are required to declare before applying for practice; these include convictions for war crimes, International Criminal Court Act 2001, s51, see: https://www.gov.uk/government/publications/dbs-list-of-offences-that-will-never-be-filtered-from-a-criminal-record-check

[72] UK Newspaper, The Independent, https://www.independent.co.uk/news/world/europe/bosnian-war-criminal-jailed-for-ethnic-cleansing-wants-to-be-town-mayor-to-apologise-550788.html and https://iwpr.net/global-voices/courtside-bosanski-samac-trial-15 [accessed 9 December 2019]. The article refers both to Simić's conviction and that he returned to an ethnically-cleansed Bosanski Šamac.

[73] BiH, National Newspaper, "For non-Serb citizens who live in the area of this municipality and still remember the war days when Dr. Simić was the sovereign ruler of life and death in Bosanski Šamac, his appointment caused discomfort. ... This is the man who was sentenced for the most serious criminal offenses in The Hague. A large number of Bosniaks and Croats go for medical treatment in Odžak, Orašje and Gradačac. They refuse to be treated in Bosanski Šamac and suffer humiliation - one of the inhabitants of Bosanski Šamac told us'; see: https://faktor.ba/vijest/sud-ponitio-imenovanje-ratnog-zloinca-simia-za-direktora-doma-zdravlja-292266 [accessed 9 December 2019].

[74] Interview, Prosecutor, Federation BiH, 09/11/2017.

[75] P. Banović, B. Simić, H. Bala, Josipović, Krajišnik, M. Tadić, Tarčulovski, Todorović, Zarić, Borovčanin, Češić, Radić, Šantić, Šainović, M. Simić, Šljivančanin, Došen, Delić, Kolundžija, Furundžija, Jokić, Kos, Mucić, Zelenović, Pušić, Kordić, Lazarevic, Pandurević, and Žigić.

[76] Article 10(3) of the ICCPR and UNSMR, Rule 61 – "the treatment of prisoners should emphasise not their exclusion from the community, but their continuing part of it" – cited in R. Mulgrew, *Towards the Development of the International Penal System* (Cambridge University Press, 2013) at 231.

[77] See Enforcement Agreements: https://www.icty.org/sid/137 [accessed 27 January 2020].

the President exercises his power under Article 28 of the Statute and releases them back into that society. What the above section outlines is that there was a lack of rigour applied by the Presidents' consideration of rehabilitation. In addition to simply not keeping abreast of the situation in the FRY (s.6.3.1), they have declined to use their powers to interrogate perpetrators' rehabilitation in relation to remorse, in cases where is has been raised by the enforcement state (s.6.3.2). Additionally, the practice of according greater weight to a perpetrator who has lied under oath to that of the enforcement state (s.6.3.3) appears misguided. These incidences demonstrate occasions where the legitimacy standard of procedural fairness was not met as the Presidents failed to adopt "clear procedures"[78] to obtain up to date, impartial information (a psychological report rather than a prison warden or perpetrator's own testimony) on the perpetrator's level of rehabilitation.

The following section, based primarily on interview data from The Hague, proposes why there was this apparent lack of rigour in Presidents' assessment of rehabilitation.

6.4. Considering Rehabilitation: Explaining the Presidents' Apparent Lack of Rigour

6.4.1. Basis of Explanation

Interview analysis from The Hague provides three main reasons why the Presidents' decisions indicate a lack of rigour in the assessment of the perpetrator's rehabilitation. First, was the lack of a nuanced approach considering the nature of perpetrators of atrocity crimes as distinct from perpetrators of grave crimes at the national level. Second, were the practical limitations faced by the Tribunal and the acceptance of these limitations.[79] Third, was the sense of resignation that rehabilitation of perpetrators of atrocity crimes was simply too complex an issue for the Tribunal to engage with.

6.4.2. Lack of a Nuanced Approach

Perpetrators' right to rehabilitation was recognised early on in the Tribunal's lifetime (albeit not accorded a priority). The judges, in determining a sentence for *Furundžija*, found guilty of torture and outrages upon personal dignity, noted that, despite the primary purposes of sentencing being retribution, stigmatisation and deterrence, "none … should be taken to detract from the Trial Chamber's support for rehabilitative programmes in which the accused may participate while serving his sentence".[80] This statement indicates two things: firstly, the Tribunal recognised perpetrators'

[78] M. Adler, 'A Socio-Legal Approach to Administrative Justice' (2003) *Law and Policy* 25(4): 323-352 at 326. See Chapter 3, s. 3.5.2.
[79] As a theme that runs throughout this thesis and see Chapter 5, s.5.4.5.
[80] *Prosecutor v. A. Furundžija*, Trial Chamber Decision, 10 December 1998, para. 291.

right to rehabilitation and supported that right;[81] secondly, responsibility for perpetrators' rehabilitation lay with the enforcement state. There were a minority of interviewees (three judges and two staff members) who emphasised the principle of perpetrators' right to rehabilitation, although there was an inconsistency as to the nature and means of that rehabilitation. One judge captured this underlying principle well:

> I am not so much talking about the ICTY, [any] singular cases but we should help all those who served their sentence to reintegrate into society …. this is difficult, of course, and not everybody is happy with some people running around [but] he has the right … to be rehabilitated … and to be reintegrated into society.[82]

He asserted his belief that persons should be given a second chance where they seek one. This approach is in line with the ICCPR that prison should serve to rehabilitate the perpetrator and prepare them for return to society. [83] However, the judge's assertion was somewhat misplaced. Firstly, the perpetrators granted UER by the Tribunal had not served their whole sentence. Secondly, his apparent principle is based on ordinary criminals returning to society where they are considered deviant by the majority. This is not the case for many of the Tribunal's convicts upon release. As discussed in the following chapter, many high and mid-level political or military leaders receive a hero's welcome by their community.[84] The idea of treating perpetrators of atrocity crimes as ordinary criminals has led to the Tribunal being deemed out of touch with the war-affected communities, the society to which the majority of the perpetrators return.[85] This removal of the perpetrator from the context of their crimes and their return was indicated later by the same judge. Although he expressed reservations at the rather "formulaic"[86] approach the President took in considering rehabilitation,[87] he too hinted at a blind-spot in relation to this rehabilitation assessment. He clarified that:

> they have to be treated equally as criminals … although for [ours] … when they return to their home country … they have a different status as normal criminals. I know that … but … we are a criminal court and not a political institution … we … apply our Rules, and that is the question 'are they criminal or not' and if they are

[81] A point reiterated by two judges in BiH – one a former War Crimes Chamber judge and another Cantonal Court judge, both adjudicating war crimes cases.
[82] Interview, Judge, The Hague, afternoon 30/01/2017.
[83] Article 10(3) ICCPR, 1966.
[84] J. M. Trbovc, 'Homecomings From "The Hague": Media Coverage of ICTY Defendants After Trial and Punishment Article' (2018) *International Criminal Justice Review* 28(4):406-42.
[85] Additionally, the judge above was also emphasising those perpetrators who do want to live a legal life. In this regard, the judge would have been speaking about perpetrators such as Landžo who were remorseful, who unlike Plavšić and other high-level political or military perpetrators, did not justify their acts during the war. The same judge acknowledged that remorse was not the case for most of the perpetrators of atrocity crimes, in which case if this is not an achievable goal then the rhetoric should be abandoned. This did not mean that there should never be an early release, but that there is one factor that both stakeholders in The Hague and in BiH believe could justify early release, and this one should be accorded more weight by the President.
[86] Interview, Judge, The Hague, afternoon 30/01/2017.
[87] This judge asserted that each application should be determined on a case by case basis.

> criminals we treat them as criminals, not as political enemies … the most important thing is that they are not recidivist.[88]

The judge, whilst recognising that the nature of the criminal and their return was different to ordinary criminals, determined that the principle of treating them as ordinary criminals was the best approach.[89] This approach was taken by another two judges, who refused to consider perpetrators' "political nature".[90] However, other international courts, notably the ECtHR, have taken a more nuanced approach to perpetrators of atrocity crime and their eligibility for early release. If the judges had actively considered international law, as they had done in their sentencing decisions,[91] rather than simply the enforcement states' reports, they may have been less willing to grant UER. The ECtHR has found that a sentence of life imprisonment, with the "prospect of release",[92] is not considered contrary to Article 3 (torture, inhumane and degrading treatment), or Article 5 (arbitrary or disproportionate punishment) if imposed for very serious offences. This was held in *Sawoniuk v. UK* (2001) specifically for a perpetrator found guilty of atrocity crimes committed against the Jews in World War II.[93]

Furthermore, under international human rights law, there is no automatic right to early release or parole. There is a right to be considered, fairly, for parole. The UN Human Rights Committee has ruled that "release should not be a mere theoretical possibility",[94] although it is not to be assumed. The rule is that "right to parole arises at the time when the offender *justifiably qualifies* for it".[95] Reading these two clauses implies that perpetrators must have their application for early release rigorously examined: their release should be justifiable.

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[88] Interview, Judge, The Hague, afternoon 30/01/2017.

[89] This thesis is not proposing that perpetrators of atrocity crimes are treated as political enemies or that they do not have the right to be rehabilitated. The argument presented here is that their rehabilitation should be assessed differently and that not all human rights are equal, and specific provisions should be made for their return to a particular society. Counter-intuitively, in a few of the earlier UER decisions a perpetrator's "capacity for rehabilitation"

[90] Interview, Judge, The Hague, afternoon 30/01/2017 and Interview, Judge, The Hague, 01/02/2017.

[91] See Chapter 4, s. 4.2.3

[92] *Sawoniuk v. The United Kingdom*, Third Section Decision as to the Admissibility of Application, ECtHR, no. 63716/00, see: http://echr.ketse.com/doc/63716.00-en-20010529/view/

[93] S. Snacken, 'Reductionist penal policy and European human right standards' (2006) *European Journal on Criminal Policy and Research* 12: 143-164 at 155.

[94] UNHRC, Communication N. 1968/2010, CCPR/C/112/D/1968/2010 (November 17, 2014) para. 7.7, cited in J.D. Mujuzi, 'A Prisoner's Right to be Released or Placed on Parole: A comment on Ocalan v Turkey (No.2) (18 March 2014) *Baltic Journal of Law and Politics* 9(1): 2016, 78.

[95] UNHRC, Communication No. 1968/2010, CCPR/C/112/D/1968/2010 (November 17, 2014) para. 7.7, cited in J.D. Mujuzi, 'A Prisoner's Right to be Released or Placed on Parole: A comment on Ocalan v Turkey (No.2) (18 March 2014) at 85.

6.4.3. The Responsibility of the Enforcement State

Almost half of Tribunal interviewees reiterated that it was the responsibility of the enforcement state,[96] and not the Tribunal, to rehabilitate perpetrators.[97] This view was presented by way of explaining the Presidents' "formulaic" assessment of the perpetrators' rehabilitation. Many of the interviewees who highlighted this reality did not come across as criticising enforcement states, but as emphasising the challenges of rehabilitating perpetrators of atrocity crimes. This underlying attitude contributes to the sense of futility of attempting rehabilitation, detailed below s.6.4.4. Their statements (six of the nine) were often accompanied with a sense of resignation that "rehabilitation programmes are not designed for war criminals".[98] The apparent lack of rehabilitation efforts during perpetrators' enforcement of sentences is reflected in the broad and varied information that the Tribunal Presidents have considered in assessing rehabilitation. Holá and others' analysis of early release decisions has identified 16 categories the President has considered.[99] These categories have included perpetrators' adherence to the prison rules,[100] good relationships with other prisoners,[101] mountain walks,[102] visits to the shops,[103] and baking.[104] These findings speak to a lack of provision for perpetrators to undergo personal reformation, as required under Article 10(3) of the ICCPR. This supports Mulgrew's argument that perpetrators are simply "warehoused"[105] in European prisons. In only one case does it appear that a perpetrator had received a form of tailored rehabilitation treatment. This one perpetrator, Landžo (s.6.6), had long-term therapy and twice-monthly meetings with a prison psychologist. This treatment appears to have come at the initiative of the enforcement state who had a "prison psychologist".[106]

In addition to a sense of an overarching, insurmountable, psychological challenge to rehabilitate perpetrators of atrocity crimes, three interviewees, two of whom were senior members of staff, spoke of the pragmatic challenges and inferred a power imbalance between the Tribunal and the

[96] Nine of the 18 Tribunal interviewees expressed this opinion. This practical matter speaks to another theme throughout the findings, the significance of the international community (and in the instance of UER - one segment of that audience - the enforcement state) and their dominance over other audiences and stakeholders, the local population in BiH.
[97] Three judges (including one former President) Former President, Senior Staff Member Registry, Staff Member Registry, Legal Officer, WVU, and Staff Member at the President's Office.
[98] Interview, Staff Member, The Hague, 23/01/2017.
[99] B. Holá and J. van Wijk, 'Rehabilitating International Prisoners', in R. Mulgrew and D. Abels (eds.) *Research Handbook on International Penal System* (Edward Elgar, 2016) at 284.
[100] All decisions, note their compliance with prison rules or their non-breach of rules, or where they have breached regulations explanations as to why.
[101] All decisions, with the exceptions of Delić who explained his disagreements with fellow prisoners.
[102] Z. Vuković, Early Release Decision, 11 March 2008, para. 4.
[103] Momir Nikolić, Early Release Decision, 15 October 2015, para. 21.
[104] B. Plavšić, Early Release Decision, 14 September 2009, para. 9.
[105] R. Mulgrew, 'Towards the Development of the International Penal System (Cambridge University Press, 2013) at 25.
[106] The fact that a "prison psychologist" met with Landžo implies that the psychologist was assigned to the prison in general rather than specifically for Landžo himself but had during this time, as shall be discussed later, assisted in Landžo's apparent rehabilitation, including that of remorse.

enforcement state (Chapter 5, s.5.4.5). This was put most directly by one interviewee: "No third state really wants to enforce a sentence".[107] The notion of states being reluctant to enforce sentences for ICTY perpetrators was implied in ICTY's Manual on Developed Practice which applauded the Registry's "persistent and creative approach to the negotiation of enforcement agreements".[108] The adjective "persistent" and the word "negotiation" imply that obtaining enforcement agreements was not a straight-forward task. The statement followed a list of different "constraints" on potential enforcement states, *inter alia* "the high costs of enforcement … the reluctance of Governments to accept inspections of their prisons by external monitoring bodies, and a State's lack of an appropriate socio-cultural environment in its prisons for persons from the former Yugoslavia (including the absence of other prisoners with similar socio-linguistic-cultural backgrounds)".[109] This context suggests that the President was not in a position where he could pressure enforcement states to have tailored treatment for these perpetrators. Tailored treatment would create practical challenges and financial burdens, for example, recruiting a Serbo-Croat speaking interpreter or a psychologist where the perpetrator did not speak the local language. In such a scenario, the enforcement state may be disinclined to accept other perpetrators. Additionally, these burdens could make other states reluctant to enforce these sentences.

It is not disputed that it was the responsibility of the state rather than the Tribunal to put in place conditions which could assist the rehabilitation. What is asserted is that the President and judicial colleagues had the responsibility to fully consider all four factors[110] outlined in the RPE in the termination of punishment. This included consideration of a demonstration of rehabilitation. Gravity of the crime is the first factor listed under the RPE. On a plain reading this implies that the subsequent factors listed have to counter the gravity of the crime, which determined the sentence. Gravity was a core determination in punishing. However, it appears some judges have detached the purpose of punishment and the purpose of imprisonment. One judge, when asked if he could prioritise the factors to consider in an early release application responded:

> Let's go the other way. Which is the most unimportant? Gravity of the crime is reflected in the sentence. In my view, of course you should not … release someone

[107] Interview, Senior Staff Member, The Hague, 02/02/2017.
[108] ICTY Manual on Developed Practices Prepared in conjunction with UNICRI as part of a project to preserve the legacy of the ICTY.
[109] ICTY Manual on Developed Practices Prepared in conjunction with UNICRI as part of a project to preserve the legacy of the ICTY, at 152, see: http://www.icty.org/x/file/About/Reports%20and%20Publications/manual_developed_practices/icty_manual_on_developed_practices.pdf
[110] RPE, Rule 125, Gravity of the crime, cooperation with the prosecutor and similarly-situated prisoners.

> too easily but, the decision on early release is not a moment where a President should review the gravity of crime as established by the Chamber.[111]

Although the purpose of punishment and the purpose of imprisonment are distinct,[112] when it comes to the moment of considering a premature ending of that punishment the two purposes coincide and should be examined alongside each other. Also, as a mere technical point, gravity of the crime is listed as a factor to consider, and thus should be considered. The question to ask is whether the perpetrator's character appears to have been reformed to the extent that the purpose of imprisonment has been achieved, thus outweighing the original purpose of punishment.

Further, the President was and is not powerless as the PD enables him or her to request further information considered to be relevant. Additionally, despite the apparent lack of specific programmes to address rehabilitation, 28 of the 54 perpetrators granted UER had met with a psychologist during their imprisonment; thus, although a challenge, psychological support was not an impossibility. As the PD enables the President to request additional information, nothing appears to prevent him from ordering an independent psychological assessment where none has been conducted. This action would have been more thorough than the dominant practice up until February 2017, namely, taking good behaviour in prison and perpetrators' testimonies as adequate evidence of rehabilitation weighing in favour of their early release.

6.4.4. The Complexity of Assessing Rehabilitation for Atrocity Perpetrators

Over half of the Tribunal interviewees[113] expressed doubts as to whether rehabilitation was a possibility for perpetrators of atrocity crime, especially those who were motivated by ideology. One staff member, though not a lawyer,[114] expressed surprise on hearing that rehabilitation was listed as a purpose of imprisonment in the Tribunal's case law: "Rehabilitation is not for war crimes – right?"[115] The interviewee's response was a blunt expression of what seven other interviewees, with legal training (three judges and two lawyers) or with professional prison experience (two staff

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[111] Interview, Judge, The Hague, 01/02/2017.

[112] R. Mulgrew, *Towards the Development of the International Penal System* (Cambridge University Press, 2013) argued that the two are separate, "A Divisible Concept of Punishment: Imposition (Justification for Sanction) Retribution; and Implementation (Justification for the Penal Regime) Rehabilitation at 213. This thesis asserts that when it comes to a sanction being ended prematurely the two should be considered alongside each other. Also see: Henham cited in G. Vermeulen and E. de Wree, *Offender Reintegration and Rehabilitation as a Component of International Criminal Justice?* (Maklu Publishing, 2014) at 79.

[113] Eight of the 19 Tribunal interviews; 18 interviewees were from the Tribunal in The Hague and one interviewee in BiH, Sarajevo Office, 08/11/2017.

[114] A lawyer, with basic knowledge of International Human Rights Law, should be aware that the ICCPR provides that the primary purpose of imprisonment ought to be rehabilitation.

[115] Interview, Staff Member, The Hague, 03/02/2017.

members), who did consider rehabilitation as a purpose of imprisonment, had concluded. These interviewees spoke about the significance of the motivation of perpetrators' crimes and asserted that rehabilitating those who were "ideologically driven"[116] would be an insurmountable task. One judge expressed this view as he noted that he had read a study on perpetrators of atrocity crimes which found that of the fifty participants in the study "no one ever expressed remorse". He then reflected on war criminals from the Second World War and concluded "remorse – it doesn't exist".[117] The judge's statement implied a sense of resignation that perpetrators of ethnically or racially motivated hate-based crimes could simply not be rehabilitated. Another judge expressed a similar sense of resignation. He believed he could see what rehabilitation was and had seen "a few cases" of "real remorse" but overall concluded that "I can't say I am very optimistic about that at the Tribunal".[118]

The attitude that rehabilitation was only a remote possibility and too complicated to assess for perpetrators of atrocity crimes was expressed more forcefully by one judge. When discussing whether the President had the capacity to assess rehabilitation the question - whether early release should be denied to perpetrators who effectively deny their crime – was asked and the judge swiftly brought the discussion to a close. He asserted: "most of the time they would think that they are completely innocent and that they are unjustly imprisoned so how does that effect rehabilitation? It's a complicated matter [and] I would prefer not to get into a discussion on that because it is never ending".[119] Here the judge recognised that perpetrators denying crimes had been problematic for the Presidents' assessment of rehabilitation but simultaneously refused to engage with the problem. This attitude illustrates Holá *et al.*'s observation that "the President seems to be reluctant to draw any negative consequences from these discrepancies".[120] His stance reflected this as he refused to be drawn into a discussion "problematizing"[121] this discrepancy, based on his belief that it was simply too complex an issue. Thus, the apparent discrepancy is swept under the carpet.[122]

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[116] Interview, Senior Staff Member, The Hague, 02/02/2017.

[117] Interview, Judge, The Hague, afternoon 30/01/2017. Regrettably this study has not been found. The judge's statement implied a sense of resignation that perpetrators of politically motivated crimes could simply not be rehabilitated. This was the same judge cited in s.5.4.2, emphasising that perpetrators had the right to be rehabilitated, and focused his attention on lower-level perpetrators who he believed could undergo rehabilitative programmes in order to prevent recidivism and the responsibility of the enforcement state to undertake these. He also noted that it was not for the Tribunal to reconcile the communities. As discussed in Chapter 5, many interviewees at the Tribunal were keen to highlight their limited role, and the notion expressed by judges that their role ended when they handed down the sentence.

[118] Interview, Judge, The Hague, 01/02/2017.

[119] Interview, Judge, The Hague, morning 30/01/2017.

[120] B. Holá et al, 'Does Remorse Count? ICTY Convicts' Reflections on Their Crimes in Early Release Decisions' at 359.

[121] B. Holá et al., 'Does Remorse Count? ICTY Convicts' Reflections on Their Crimes in Early Release Decisions' at 366.

[122] This apparent refusal to fully reflect on what perpetrators' denial of crimes signified in terms of rehabilitation has caused a number of the Presidential decisions on UER to read as, at best, "superficial".[122] In eight decisions where there was clear ambiguity on the perpetrator's level of rehabilitation, by their denial, raised by the enforcement state. Yet the

Although these three judges perceived rehabilitation as too complex a matter to engage with, five of the eight Tribunal judges interviewed[123] had given consideration to guilty pleas and the accused's sincerity of remorse in sentencing. Thus, it is not inconceivable that, given that they had undertaken this task before, they had the capacity to do so again. Remorse is frequently taken into account as a mitigating circumstance in criminal law and similarly in parole board hearings.[124] Although remorse, at the sentencing phase, has been accused of "lacking clarity and uniformity in both its definition and the characteristics that signal its presence or its absence,"[125] that does not mean that this should not be considered at this stage of the justice system. Further, it is argued here that thorough examination of perpetrators sincerity of remorse would be more in line with the UN Human Rights Committee's recommendation that release of offenders should be when they "*justifiably qualif[y]* for it".[126]

As discussed below, this apparent refusal to engage with what rehabilitation entails for these perpetrators has had a negative impact on the perceived legitimacy of the President's decision-making capacity as the perpetrators return to the region.

6.5. A Proclaimed Demonstration of Rehabilitation – Impact on the Tribunal's Sociological Legitimacy

One judge noted the potential for the credibility of the Tribunal to be undermined by Presidential findings of "rehabilitation" in an unrepentant perpetrator:

> We have some … the President [has] said, 'this person has obviously shown signs of rehabilitation' and this person goes back to Banja Luka … and all of a sudden becomes a big campaigner against the Tribunal, against the other ethnic groups … What does it all mean? Either we are stupid, or we made a big mistake or this person is a bastard. It's probably the last one.[127]

The judge's statement recognised that with this lack of a full consideration of rehabilitation and subsequent grant of early release, the ICTY can be perceived as, and, indeed, was cited as having

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President had determined, based on their good behaviour in prison, that the perpetrator had demonstrated rehabilitation nevertheless.

[123] Seven judges were interviewed in The Hague, January – February 2017. The eighth judge was interviewed in Paris in September 2018, thanks to a university grant.

[124] M. Proeve and S. Tudor, *Remorse: Psychological and Jurisprudential Perspectives* (Ashgate Publishing, 2010) 87.

[125] R. Zhong *et al.*, 'So You're Sorry? The Role of Remorse in Criminal Law' at 39.

[126] J.D. Mujuzi, 'A Prisoner's Right to be Released or Placed on Parole: A comment on Ocalan v Turkey (No.2) (18 March 2014) at 85. See 6.4.2.

[127] Interview, Judge, The Hague, morning 30/01/2017.

been "tricked"[128] by the perpetrator. He also recognised that was important as he added "the area of granting early release is a very delicate issue and should engage, not just us, but all … international criminal tribunals because it is very, very important".[129] Nevertheless, the judge followed his statement by arguing that the Tribunal was unable to make an assessment of the situation for itself as it relied on the enforcement states' recommendations. He acknowledged the controversies of early release but in his overall conclusion he was clear that the Tribunal had limitations. When asked if there should be further probing of the states' recommendations, and the perpetrators' submissions, he concluded, "Someone goes to prison, tries his best or her best to behave because that way you are treated better; it's better to behave rather than not … Doesn't mean to say that suddenly from a very bad man you have become a very good man. People lie".[130]

This judge's sense of inevitability that "people lie" was unfortunate because the UER of unrepentant and high-level perpetrators created a legitimacy deficit in the Tribunal. This finding (below) was articulated by one Tribunal staff member who reflected, UER "doesn't make any sense, it's just like giving someone the possibility of discrediting the organisation".[131] The notion that UER discredited the organisation was demonstrated by three interviewees in BiH. The two interviewees who began their attitudes on rehabilitation by their reaction to the release of Plavšić stated that she had tricked the Tribunal.[132] The perception of the Tribunal having been tricked was summed up by one interviewee in BiH who had actually read the decision itself. Although she perceived the Tribunal as legitimate overall, she believed UER was wholly illegitimate. She recalled her disbelief at Plavšić's UER (2011) and the hero's welcome she received. Her shock had led her to find and read the President's decision.[133] Although she could not remember the details, she recalled the lack of scrutiny applied as the President "only describes her good behaviour in prison … there was something in it … like she's an old lady and her health is poor". She spoke of her sense of disappointment: "Are you … judges or just some housewives? That didn't seem like at the very high professional level".[134] Her use of the term "housewives" denotes a sense of her perceiving the judges as faltering in the quality of decision-making, in the Tribunal's legitimacy of exercise. She had

[128] Interview, Prosecutor, Sarajevo, Republika Srpska, 17/11/2017, and Interview, NGO Representative, Sarajevo, 02/11/2017.
[129] Interview, Judge, The Hague, morning 30/01/2017.
[130] Interview, Judge, The Hague, morning 30/01/2017.
[131] Interview, ICTY, Sarajevo, 08/11/2017.
[132] Interview, Prosecutor, RS, Sarajevo, 17/11/2017, and Interview, Prosecutor, Republika Srpska 22/11/2017.
[133] Only three of the 51 BiH interviews had indicated that they had read an early release decision – one NGO, one independent expert and one defence lawyer, who had represented a perpetrator at the Tribunal.
[134] Interview, Independent with professional experience engaging with victim-witnesses in Srebrenica, Sarajevo, 21/12/2017.

expected more of "highly-educated people",[135] her description of them later on in the interview. Within this interviewee's framing therefore, if one of the President's justification for granting an early release was on the basis that the perpetrator had demonstrated some evidence of rehabilitation, she had expectations that this would be the case. This particular decision was a demonstration of the Tribunal failing to meet one of Leventhal's criteria for good procedural justice, that of "accuracy of decision-making". This is evaluated as the "ability of a procedure to reach solutions that are objectively of a high quality, and this depends on using accurate information and informed opinion".[136] The information that the President bases his determinations on, discussed below, was not perceived by the majority of stakeholders interviewed as being accurate information which enabled him to make an objective decision on perpetrators' demonstration of rehabilitation.

6.6. Assessing a Demonstration of Rehabilitation

Holá et al.[137] have correctly asserted that the "Tribunal has not developed a clear and consistent conceptualisation of what rehabilitation of perpetrators of international crimes entails and how to assess it".[138] Within the thesis' framing of legitimacy, the Presidents' consideration of rehabilitation, therefore, fell short of the standard of procedural fairness.[139] Rehabilitation programmes in many domestic settings (where indeed ICTY perpetrators are held) frequently engage "offenders … as moral actors with the capacity both to re-evaluate the past (anti-social) choices and to make … pro-social choices in the future".[140] The first, backward-looking element implies perpetrators' "reformation", in the words of the ICCPR, whereby there is an acknowledgement that the criminal acts were wrong. The International Criminal Court's (ICC) Rules and Procedures of Evidence (RPE) encompass this notion of reformation. The ICC's RPE were available at the time of the ICTY's UER decisions, which require the ICC Judges to examine a perpetrator's conduct in detention, and assess the extent to which this indicated a "genuine disassociation from his or her crime".[141] As s.6.7 details, this understanding of rehabilitation closely aligns with what the majority of interviewees in

[135] Interview, Independent with professional experience engaging with victim-witnesses in Srebrenica, Sarajevo, 21/12/2017.
[136] T. Tyler, *Why People Obey the* Law (Yale University Press, 1990) discusses one of Leventhal's six criteria by which people evaluate fairness of a procedure, 119.
[137] Holá and colleagues have written on the rehabilitation of perpetrators of atrocity crimes by reference to the ICTY Presidents' early release decisions. They called for qualitative research to be undertaken in the region to assess the impact these decision had.
[138] B. Holá *et al.*, 'Does Remorse Count? ICTY Convicts' Reflections on Their Crimes in Early Release' at 365.
[139] See Chapter 3, s.3.5.2.
[140] G. Robinson and I. Crow, *Offender rehabilitation, theory, research and practice* (Sage, 2013) at 121 cited in B. Holá *et al.*, 'Does Remorse Count? ICTY Convicts' Reflections on Their Crimes in Early Release' at 352.
[141] ICC Rules and Procedure of Evidence, Rule 223 Criteria for review concerning reduction of sentence.

BiH believed would be a demonstration of rehabilitation: acknowledgement and remorse for the crimes, which could be one justification for an early release, albeit never unconditional.

The following section turns to one factor which the stakeholders interviewed (insiders at the Tribunal and outsiders in BiH) believed should not be used to assess rehabilitation, and which has, ironically, been the only consistent element Presidents have considered as evidence for rehabilitation: their good behaviour in prison.

6.6.1. Good Behaviour in Prison

Examples of good behaviour in prison as evidence of rehabilitation include: perpetrators' obeying prison rules;[142] not breaking prison rules;[143] being polite to prison staff;[144] having good relationships with fellow prisoners;[145] and undertaking activities such as woodwork,[146] language classes.[147] The Tribunal's Presidents have considered the prison reports of perpetrator's "behaving immaculately"[148] or their behaviour being "exemplary"[149] as evidence of rehabilitation. Good behaviour as a determining factor in a demonstration of rehabilitation was explicitly rejected by almost all interviewees in The Hague (with the sole exception of one judge, a former President) and almost half the interviewees in BiH.

One Tribunal judge reflected on the challenge of determining rehabilitation generally - "What is rehabilitation in prison?"[150] The majority of his colleagues and Tribunal staff were more categorical that the consideration of good behaviour in prison as an indicator of rehabilitation was "a stupidity",[151] a "nonsense",[152] a "false measure".[153] The perception that considering good behaviour as a sign of rehabilitation is an idiocy echoes the criticism of Galbraith in his censure of judges' "undertheorized" approach in their consideration of how perpetrators' "good deeds" should be

[142] Early Release decisions of D. Tadić, Zelenović, Blagojević, Delić, Bala, Strugar.
[143] Early Release decisions of Momir Nikolić, Obrenović, Šljivančanin, Dragan Nikolić.
[144] Early Release decisions of Jokić, Kubura, Kvočka, Momir Nikolić, Strugar, Landžo, Naletilić, Pušić, Borovčanin.
[145] Early Release decisions of A. Kubura, E. Landžo.
[146] R. Kovač, Public Redacted Version of the 27 March 2013 of Decision the President on the Early Release of Radomir Kovač, 3 July 2013.
[147] P. Banović, Decision of the President on Commutation of Sentence, 3 September 2008.
[148] N. Šainović, Early Release Decision, 27 August 2015, para. 20.
[149] Early Release Decisions M. Krnojelac, and T. Blaškić.
[150] Interview, Judge, The Hague, 01/02/2017.
[151] Interview, Judge, The Hague, morning 30/01/2017.
[152] Interview, Judge, The Hague, afternoon 30/01/2017.
[153] Interview, Senior Staff Member, The Hague, 24/01/2017.

considered as mitigating factors in sentencing.[154] The attitude expressed by the interviewees in The Hague was reflected in BiH, although the language was not as strong. Several reasons were put forward as to why good behaviour in prison was totally irrelevant to consider as evidence of rehabilitation. Firstly, on a practical level, interviewees in both The Hague and BiH were quick to point out that perpetrators were required to behave well in prison, at least by obeying prison rules - if not, they were aware that they would suffer consequences.[155] Secondly, by behaving well in prison perpetrators would benefit. Their good behaviour would mean that "they will be treated better"[156] and privileges may arise.[157] This could include a remission of sentence.[158] This second reason to discount good behaviour, more favourable treatment, was connected to a sense of frustration was and a theme throughout the findings, that is, interviewees perceived as ongoing favourable treatment to perpetrators of atrocity crime compared to the lived reality of their victims (detailed in Chapter 8, s.8.2). It frustrated many interviewees that perpetrators were continually being accorded high standards of treatment, including opportunities to communicate with their families – in stark contrast with a number of their victims whose family members had been murdered. In prison, by behaving well they received rewards such as leave of absences for family visits[159] and relaxed security.[160] These above reasons were practical and applicable for every criminal. The third reason to dismiss good behaviour was rooted in the distinct nature of atrocity crimes and the criminals.

The third reason to discount good behaviour in prison was that perpetrators of atrocity crimes were believed to be fundamentally different to the average perpetrator of crime, given the nature of their crimes and the context in which they were committed. One interviewee at the Tribunal emphasised that although some perpetrators might have been of a violent character generally, these were a limited number. Most were not deviant people who would have a propensity to criminality. [161] Further, many came from respected elements of society, including teachers,[162] academics,[163] and

[154] J. Galbraith, 'The Good Deeds of International Criminal Defendants' (2012) *Leiden Journal of International Law* 25(3): 799 – 813 at 799. See Chapter 4, s. 4.4.2.
[155] 12 interviewees in BiH noted this.
[156] Interview, Defence Attorney, Sarajevo, 03/11/2017.
[157] Explicitly noted in the Early Release Decision of Tarčulovski as he was considered a "well-behaved prisoner, enjoying a wide range of privileges available to him based upon his good conduct in prison. And Momir Nikolic was also noted to have benefits of unaccompanied visits to the local shopping mall based on good behaviour.
[158] Indeed, Šantić was granted remission of sentence and consequently served less than two-thirds of his original sentence. See Decision of the President on the Application for Pardon or Commutation of Sentence of Vladimir Šantić, 16 February 2009, para.14. Other decisions which may also reduce the two-thirds calculation include Stakić, Decision of the President on Sentence Remission of Milomir Stakić, 17 March 2014. D. Mrđa, Early Release Decision, 13 December 2013, para. 7. Further, President Meron has "provisionally recognised" the sentence remission of Jelisić, granted by the Italian authorities, Decision of the President on Sentence Remission of Goran Jelisić, 28 May 2013, para.34.
[159] Momir Nikolić, Early Release Decision, 15 October 2015, para. 21.
[160] Kordić, Early Release Decision, 6 June 2014, para. 19 – Kordić was detained under 'relaxed pre-release detention'
[161] Interview, Senior Staff Member, The Hague, 02/02/2017, and interview, Defence Lawyer, Sarajevo, BiH, 03/11/2017.
[162] Krnojelac had been a teacher in a local school.

medical doctors.[164] Interviewees argued that the majority lived organised lives, they had indeed organised others' lives, and knew how and when to obey rules for their own gain. They were not, unlike ordinary criminals of violent crimes, physically dangerous people and they were unlikely to reoffend in the same manner.[165] As noted by Luban, these perpetrators were generally "ordinary, law-abiding citizens, good men and good neighbours, in peacetime".[166] However, the war had changed the situation, and although there was no war in BiH, life prior to the war had not been restored, for example, there are significant numbers of displaced people.[167] Thus, perpetrators' ordinariness and their good behaviour reflecting this, was not a relevant consideration for the President to consider as rehabilitation.

Evidence of rehabilitation had to go beyond the everyday acts (good behaviour) of the perpetrator into their state of mind. It had to go beyond what the President had considered above and their assessment had to be rigorous – rather than granting the perpetrator the benefit of the doubt (s.6.3.3). This is due to the specific *mens rea* of atrocity crimes. Atrocities were committed within the context of ethnic hatred.[168] The victims of the crimes were targeted based on their association with or belonging to a particular ethnic group. This is articulated most eloquently by the Tribunal in the case of *Kunarac et al*.[169] As part of the ethnic cleansing of Foča, those found guilty of rape and sexual enslavement were convicted of crimes against humanity, as they "mistreated … Muslim girls and women, and only Muslim girls and women, because they were Muslims."[170] Their individual acts were committed because the perpetrators had "fully embraced the ethnicity-based aggression of the Serbs against the Muslim civilians, and all their criminal actions were clearly part of, and had the effect of, perpetuating the attack against the Muslim civilian population".[171] Just as the victims were symbolic, so too were the perpetrators now being considered for UER.[172] Their return had potential to cause a societal impact. This element of the perpetrator's state of mind speaks to the IHRL

[163] Plavšić had been a Professor of Biology at the University of Sarajevo.
[164] B. Simić had been a practising medical doctor.
[165] Indeed, this was noted by a Tribunal judge who stated that "a war criminal needs a war to commit crimes" Interview, Judge, The Hague afternoon 30/01/2017.
[166] See Chapter 3, s.3.4.2 in relation to considering the purposes for sentencing for perpetrators of atrocity crimes; D. Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law' in S. Besson and J. (eds.) *The Philosophy of International Law* (Oxford University Press, 2009) at 575.
[167] D. Orentlicher, noting that one victim returning to her small home town of Prijedor was still unable to return to her home as Serb neighbours now occupied it and the local authorities refused to take action. D. Orentlicher, *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia* (Oxford University Press, 2018). See Chapter – "The Quality of Justice: Bosnian Assessments" 127-189.
[168] Gvero, Early Release Decision, para.4, referring to the Trial Chamber Judgment, "Trial Chamber is satisfied that Gvero carried out his acts with the specific intent to discriminate on political, racial or religious grounds. The Trial Chamber therefore finds Gvero criminally responsible for committing persecution" 10 June 2010, para. 1833.
[169] Prosecutor v. *Kunarac et al,* Trial Chamber Judgment, 22 February 2001.
[170] *Kunarac et al*, Trial Chamber Judgment, 22 February 2001, para. 592.
[171] *Kunarac et al*, Trial Chamber Judgment, 22 February 2001, para. 669.
[172] Discussed in the following Chapter, Moral Condemnation Negated at UER.

obligation on states to prepare a perpetrator for social reintegration,[173] which recognises rehabilitation as a relational matter. Thus, the perpetrator's behaviour cannot be assessed in isolation from the society to which he or she will return. This social rehabilitation was articulated best by one BiH interviewee who, as a defence lawyer, said if she was a judge considering early release, she would examine "his reintegration into society … if he can live in a multi-ethnic environment and not be hateful and not be discriminating or not be, whatever [he was] during the war".[174] Her statement emphasises that a reformed character is needed, that the hatred perpetrated during the war should be changed, that he is no longer hateful or discriminating. She then went on to list what she considered as evidence of a rehabilitated perpetrator: a man who has "apologised" to the woman he raped or written letters to the families of those he killed to "make amends".[175] These actions both imply a sense of remorse.

6.6.2. Personal Reformation - Remorse

Interviewees in BiH, except for two,[176] were asked what they would consider as evidence of rehabilitation. Half of these interviewees used the word "remorse".[177] Despite most interviewees[178] being principally against early release for perpetrators of atrocity crimes, when the question arose of what judges should consider as evidence of rehabilitation, they spoke of "remorse". In contrast, only three interviewees (all judges) in The Hague used the word remorse. Most interviewees in The Hague responded to the question of how judges could measure rehabilitation by stating that it was simply too difficult. Similarly, interviewees in BiH frequently asserted that the sincerity of the perpetrator's remorse was difficult to determine. Nevertheless, 26 of them regarded genuine remorse as evidence of rehabilitation, which could possibly justify an early release (s.6.7). These mixed views reflect discussions in the literature; those who argue the significance of remorse and the role of an apology,[179] those who emphasise its difficulty to assess,[180] and those who query its suitability for these crimes.[181]

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[173] See s. 6.2.

[174] Interview, Defence Lawyer, Sarajevo, BiH, 03/11/2017. Another interviewee, a judge, similarly argued that "if we speak about the purposes of punishment it's [a] confrontation with the atrocities committed, for them to be aware of the crimes committed, for them to show remorse and to offer apology", 12/12/2017.

[175] Interview, Defence Lawyer, Sarajevo, 03/11/2017; Interview, NGO, RS, 24/11/2017; and NGO (Tuzla-based), Sarajevo 07/12/2017 also believed in perpetrators findings their victim and apologising to them.

[176] Two Victims Associations, which included, three direct victims, interviewed were not asked this question as they asserted that rehabilitation was not applicable for these types of criminals and both were distressed at UER.

[177] In 26 of the 51 interviews in BiH interviewees used the words, 'remorse, or 'sorry' to articulate what they understood as rehabilitation.

[178] 16 of these 26 interviews.

[179] S. Bibas & R.A. Bierschbach, 'Integrating Remorse and Apology into Criminal Procedure' (2004) *Yale Law Journal* 114: 85-148; L. Radzik, *Making Amends: Atonement in Morality, Law and Politics* (Oxford University Press, 2009); P. Gobodo-

Only five of the interviewees proposed the means by which it could be achieved.[182] These interviewees asserted that in order to bring about remorse, perpetrators needed to engage with psychologists while serving their sentence. For one interviewee this was a prerequisite to early release: "Because of the gravity of the crimes they have committed I believe that without psychological help these people cannot be re-socialised".[183] At the Tribunal there was one judge who similarly advocated that enforcement states engage the perpetrator in rehabilitation efforts and did not believe that it was impossible. He argued that enforcement states (other than Norway, all of them members of the EU) should be better equipped for rehabilitating perpetrators who are motivated by ethnic hatred or nationalistic ideology. He said perpetrators of atrocity crimes in The Hague were not so unlike radical right-wing nationalist or Islamist extremists imprisoned in Europe. He noted that EU Member States were making efforts to develop rehabilitation programmes tailored for these criminals and that efforts, similarly, could be made for perpetrators of atrocity crimes.[184] The judge's assertion that Member States should be making such efforts is correct as this approach is proposed by the EU's Guidance from the European Agenda on Security. The EU has also established a Radicalisation Awareness Network (RAN) which provides guidance for Member States to develop policies to prevent and de-radicalise extremist ideologies.[185] Indeed, ten of the enforcement states have a Prevent and De-Radicalisation policy in place.[186]

This judge was also unsympathetic to the sense of resignation that others in The Hague had over the practical limitations of language barriers effectively barring perpetrators of sexual crimes from participating in rehabilitation programmes, where such programmes are available.[187] He noted that European countries had a number of perpetrators incarcerated who were non-nationals, and that

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Madikizela, 'Remorse, Forgiveness and Dehumanization: Stories from South Africa' (2002) *Journal of Humanistic Psychology* 42(1): 7-32.

[180] R. Zhong *et al.*, 'So You're Sorry? The Role of Remorse in Criminal Law' at 39-48.

[181] J.M Coicaud, 'Apology: A Small Yet Important Part of Justice' (2009) *Japanese Journal of Political Science* 10(1) 93–124.

[182] Interview, Victims' Association, Sarajevo, morning 06/11/2017.

[183] Interview, Victims' Association, Sarajevo, morning 06/11/2017.

[184] Interview, Judge, The Hague, afternoon 30/01/2017.

[185] Interview, Victims' Association, Sarajevo, morning 06/11/2017; Interview, Defence Lawyers, Sarajevo, 22/12/2017; Interview, Senior Staff of Policy, IGO, 21/12/2017; Interview, ICTY Staff Member, Sarajevo, 08/11/2017; and see recommendations https://ec.europa.eu/home-affairs/what-we-do/networks/radicalisation_awareness_network_en

[186] Austria, Belgium, Denmark, France, Finland, Germany, Poland, Spain, Sweden and the UK. See: https://ec.europa.eu/home-affairs/what-we-do/networks/radicalisation_awareness_network/ran-and-member-states/repository

[187] Despite being convicted of crimes of sexual violence - R. Češić, D. Tadić, H. Delić, R. Kovač do not, on reading the UER decision, appear to have been seen by a psychologist or participated in any specific rehabilitation programmes for perpetrators of these types of crimes.

interpreters should be recruited to assist with their rehabilitation. Practical efforts should be made, he argued.[188]

The case of Landžo is an important example as it speaks to the possibility that perpetrators of atrocity crime can be rehabilitated, when given the opportunity. Landžo, found guilty of directly committing sexual based torture and murder, has ostensibly been rehabilitated, as a result of treatment received during imprisonment. Scholars noted that he laughed throughout his trial[189] and showed no remorse. While serving his sentence in Finland he had bi-weekly meetings with a psychologist and, as a result, the President determined that there were signs of genuine remorse.[190] This remorse was demonstrated in 2017 in a documentary by a Scandinavian film-maker who recorded Landžo's efforts to locate his victims and his victims' families and apologise directly to them. Through these efforts he had demonstrated rehabilitation in the sense of a personal reformation; he recognised his actions as morally wrong and wanted to recognise the harm he had caused to victims by apologising to them.[191] It is noteworthy that only three victims were willing to meet with him and only one believed that he was remorseful. This victim reflected on Landžo's youth when he committed the crimes and believed that prison had served him well. None were ready to forgive.[192]

Some scholars have queried whether it is "even decent" for perpetrators of crimes against humanity to offer an apology. They have argued that the "sheer inhumanity of the crime, the dark transcendence of humanity by such crimes makes the issuing of an apology by the perpetrator somewhat absurd, if not obscene … is the perpetrator entitled to the relief he/she might get from the apology?"[193] This thesis disputes this assessment. Firstly, from a human rights perspective, the perpetrator has not lost their humanity, and has the right to rehabilitation, here in the sense of repudiating both the crimes and their motive committed. This means that perpetrators are free to offer an apology. It does not oblige the victim to accept it; described by Govier and Verwoerd as the

[188] Additionally, he argued that in some cases there may be an actual danger of other offences in relation to some perpetrators, in particular perpetrators of sexual crimes. He believed that atrocity crimes such as sexual enslavement, were not in his view too dissimilar to sex-trafficking. Although they could not commit atrocity crimes they could nevertheless be dangerous if returned to society. Very little is known about these more direct perpetrators who do return.

[189] E. Neuffer, *The Key to My Neighbour's House*, 301 cited in E. Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (Pennsylvania University Press, 2005) 69.

[190] *Prosecutor v. Esad Landžo*, Order of President on Commutation of Sentence, 13 April 2006, para. 9.

[191] S. Bibas and R.A. Bierschbach, 'Integrating Remorse and Apology into Criminal Procedure' at 147.

[192] Thanks to an NGO interviewee (16/10/2017), who provided the link to this film.

[193] J.M. Coicaud, 'Apology: A Small yet Important Part of Justice' at 102.

"victim's prerogative".[194] Indeed, this was demonstrated in BiH as one interviewee said, "They say they are sorry, they are remorseful. Me personally, I cannot accept this. I cannot. I don't believe these people can be remorseful".[195] This victim was not alone; two other interviewees also flatly rejected the proposition that an expression of remorse could provide a justification for early release. The scepticism of, and disregard for, any proffered apology, echoes others' findings in relation to guilty pleas and statements of remorse being disbelieved.[196] Many believed that such an apology was self-serving. Yet victims are not a homogeneous group;[197] 26 interviewees who had lived through the war, three being direct victims, spontaneously identified a role for "remorse". These 26 did not perceive an apology as obscene; rather, they felt it important for a genuine apology to be heard. Some also posited that this was not only for the perpetrators, or victims but also for the wider-post-conflict community.

6.7. Remorse as Evidence of Atrocity Perpetrators' Rehabilitation – Obtaining Sociological Legitimacy in the Grant of Early Release

This section focuses on remorse as "evidence of a demonstration of rehabilitation" as it was proposed, and reflected at length, by many of the interviewees in BiH. Given that they are key stakeholders of the Tribunal, it is reasonable that their views be heard. Further, the release of a perpetrator affects them, and is perceived to be negative. To be a legitimate institution exercising power, it is sensible to reflect on propositions that have been put forward by them which could possibly justify (albeit not to everyone) a practice currently perceived as illegitimate by the majority of interviewees in BiH. That is, lessons can be learned by listening to stakeholders on the ground. As noted in Chapter 2, researching in the field of international criminal justice, is often not limited to exploring theories but striving for improvements in the system. Thus, making recommendations calling for adopting or amending practices based on empirical findings has the potential to contribute to maintaining or enhancing its overall legitimacy.[198] Finally, from a human rights perspective exploring this societal relationship is important as a perpetrator's rehabilitation under

[194] T. Govier & W. Verwoerdas, 'Forgiveness: The Victim's Prerogative' (2002) *South African Journal of Philosophy* 21(2): 97-111.
[195] Interview, Victims' Association, Federation, BiH, 04/12/2017.
[196] B. Holá *et al.*, 'Does Remorse Count? ICTY Convicts' Reflections on Their Crimes in Early Release Decisions' at 353 and citing J.N. Clark, 'Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation' (2009) *The European Journal of International Law* 20(2): 415–436.
[197] L. Fletcher, 'Refracted justice The imagined victim and the International Criminal Court' in C. De Vos, S. Kendall, C. Stahn (eds.) C*ontested Justice The Politics and Practice of International Criminal Court* (Cambridge University Press, 2015) at 306.
[198] S.M.H Nouwen, 'As you Set out for Ithaka': Practical, Epistemological, Ethical, and Existential Questions about Socio-Legal Empirical Research in Conflict' (2014) *Leiden Journal of International Law* 27(1): 227-260 and M. Aksenova, E. van Sliedrget and S. Parmentier, *Breaking the Cycle of Mass Atrocities: Criminological and Socio-Legal Approaches in International Criminal Law* (Hart, 2019). See Chapter 2, s.2.2.

IHRL encompasses their "social rehabilitation".[199] This implies that reintegration into the society, and how best to achieve this, should be considered. Before turning to this, two counterarguments are presented as to why perpetrators of atrocity crime should evidence remorse rather than the lack of propensity to recidivism, as noted by the Tribunal judge in s.6.4.2.

Some scholars have queried whether a state should concern itself with repentance.[200] A simple response is asserted here, articulated best by Tasioulas, who asserted that providing opportunities for repentance "enables those citizens better to comply with the values that they already have reason to comply with". Remorse as rehabilitation thus "facilitates criminal wrongdoers in atoning for their wrongs by reintegrating themselves with those values".[201] In the case of atrocity crimes, remorse for crimes motivated by ethnic hatred would be a recognition of the universal norm, that being "of the inherent dignity and equal and inalienable rights of all members of the human family".[202] This universal norm (detailed in the following chapter) fits with Tasioulas' proposition of repentance being the acceptance of "objectively correct"[203] values which a perpetrator has transgressed. Therefore, assessing this remorse for crimes based on discrimination of another ethnicity is important as the perpetrator on early release is due to return to a society which is, in principle, not discriminatory. As noted by the Sarajevo-based defence lawyer, s.6.2, "can [he] live in a multi-ethnic environment and … not be discriminating?"[204]

Another argument represented by scholars is that requiring repentance is a violation of a person's autonomy – that a state power should not manipulate people to be repentant. This thesis is not proposing that perpetrators must be rehabilitated but that they have the opportunity to be rehabilitated[205] and where they claim to be rehabilitated they should provide evidence. The notion of an intrusion into personal autonomy was raised by one interviewee in The Hague.[206] The interviewee raised this, not as their own point of concern, but reported that "a group of prison authorities … were outraged that we needed evidence of rehabilitation".[207] The interviewee did not go on to explain why prison authorities were outraged. This thesis asserts that evidence of

[199] Article 10(3) ICCPR, 1966.
[200] A. Von Hirsch, *Censure and Sanctions* (Oxford University Press, 1996) at 73-74 cited and responded to by J. Tasioulas, 'Repentance and the Liberal State' (2007) *Ohio State Journal of Criminal Law* 4(2): 487-522*: at* 498.
[201] J. Tasioulas, 'Repentance and the Liberal State' at 513.
[202] Universal Declaration of Human Rights, Preamble.
[203] J. Tasioulas, 'Repentance and the Liberal State' at 513.
[204] Interview, Defence Lawyer, Sarajevo, BiH, 03/11/2017.
[205] In accordance with IHRL.
[206] Under the Tribunal's Rules and Procedure of Evidence (RPE), Rule 125, the President's requirement to consider a perpetrator's demonstration of rehabilitation generally encompassed that the perpetrator provide some evidence of their rehabilitation.
[207] Interview, Senior Staff Member, The Hague, 02/02/2017.

rehabilitation is not unreasonable, especially given the gravity of the crimes, their motivation and context (based on ethnic hatred) and the divided society to which they return. In the parameters of international law, it is, in fact, required by the International Criminal Court's RPE. These rules outline the criteria for judges to consider in an application for a reduction of sentence for perpetrators of atrocity crimes. By listing a set of criteria judges are required to consider, it follows that evidence of these criteria is provided for consideration to be given. Although the Rules do not use the word "rehabilitation", they do imply personal reformation and perpetrators' capacity to return to society; the two principles as set out in the ICCPR. The ICC's Judges who consider a perpetrator's request for a reduction in sentence evaluate, *inter alia*, "(a) the conduct of the sentenced person while in detention, which shows a *genuine dissociation* from his or her crime; (b) the prospect of the *resocialization and successful resettlement* of the sentenced person; (c) Whether the early release of the sentenced person would give rise to *significant social instability*".[208] This third factor explicitly recognises the relational element of a perpetrator and makes clear that this societal factor should be given consideration. The ICC's Rules are raised here because the elements were alluded to by interviewees in BiH. Further, these Rules were written for the purposes of a reduction of sentence for perpetrators of atrocity crimes, whose crimes and context of return can form a baseline comparison. Additionally, these rules were available for the ICTY's President and judicial colleagues to consider at the first application for early release,[209] and subsequently thereafter.

Remorse is not mentioned in the ICC's rules but the first factor - "dissociation from his or her crime" - on plain reading encompasses remorse for the crime. The Oxford English dictionary defines "dissociation (from something) [as] the *act* of showing that you *do not* support or agree with something".[210] Additionally, in the literature, dissociation from the crime is encompassed in a perpetrator's apology for the crime. As noted by Garvey who asserted that "apology is the self's way of accepting responsibility for its wrongdoing but at the same time disavowing the wrong"[211] and where genuine can be of value. This definition and belief in the value of this is supported by the ICC's two decisions on reduction of sentences, both of which encompass elements of remorse as described by BiH interviewees. These elements were: an acknowledgement of crimes as a wrong, recognition of the harm caused to victims and an apology. The first ICC decision on an application for a reduction of sentence rejected the perpetrator's claimed disassociation from his crime as it

[208] ICC Rules and Procedure of Evidence, Rule 223. Emphasis added. The other two factors are: (d) any significant action taken by the sentenced person for the benefit of victims as well as any impact on the victims and their families as a result of early release; and (e) individual circumstances of the sentenced person, including a worsening state of physical or mental health or advanced age.
[209] D. Erdemović, Early Release Decision, June 1999, made Public, July 2008.
[210] See: https://www.oxfordlearnersdictionaries.com/definition/english/dissociation - emphasis added.
[211] S. Garvey, 'Punishment as Atonement' (1999) *UCLA Law Review* 46(6): 1801-1858 at 1816.

determined that his expression of remorse "*did not acknowledge* [the perpetrator's] own culpability [or] express[ion] of *remorse or regret* to the victims of crimes for which he was convicted".[212] Thus, he was denied a sentence reduction. In contrast, in the case of Katanga's application, the Panel of judges determined that Katanga's two actions during imprisonment constituted evidence of dissociation. First, was his withdrawal of an appeal against conviction, thereby an apparent acceptance of the Trial Chamber's finding of guilt. Second, was his public expression of regret to victims. He had a "filmed apology" to his victims – which the judges determined had shown that he had "genuinely dissociated from his crimes".[213] Thus, his application for a reduction of sentence was granted. A genuine expression of remorse, regret for specific actions, was considered as weighing in favour of his reduced sentence.

The ICC's consideration of perpetrators' dissociation from the crime reflected much of what BiH interviewees proposed as measures of genuine remorse. Interviewees who perceived remorse as rehabilitation frequently spoke of a perpetrator showing remorse. To show remorse was a positive act with a receiving audience. In the context of a demonstration of rehabilitation, this was put bluntly by one prosecutor who said, "You want early release? Then show us you are sorry".[214] The use of the word "show" implies communication – that an act is seen. Fourteen of these interviewees delved further into what should be communicated. For them the concept of remorse was linked to an acknowledgement of the crimes,[215] a recognition of harm to victims,[216] and a public apology.[217] These threefold elements echoed traits encompassed in Proeve and Tudor's model of "a remorseful person". This is a person who "thinks about what he did, how it affected other people, and may experience a sense of a changed self".[218] That is, the crime is acknowledged, the harm caused to the victim is acknowledged and, as a result of this changed mind-set, the perpetrator may wish to provide an apology. This personal reformation and resocialisation element was articulated by one BiH judge who argued that punishment should be for perpetrators' "confrontation with the atrocities committed, for them to be aware of the crimes committed, for them to show remorse and to offer apology".[219]

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[212] ICC Decision on the review concerning reduction of sentence of Mr. Thomas Lubanga Dyilo, 22 September 2015, ICC-01/04-01/06, para. 46.
[213] ICC Decision on the review concerning reduction of sentence of Mr Germain Katanga, 13 November 2015, ICC-01/04-01/07, para. 50.
[214] Interview, Prosecutor Sarajevo, RS, BiH, 17/11/2017.
[215] Six of the interviewees in BiH noted that key to remorse was the perpetrator's acknowledgement of the crime they were convicted of was morally wrong.
[216] Seven of the interviewees noted that encompassed in remorse was a recognition of harm done to victims.
[217] 13 of the interviewees in BiH argued that perpetrators to be granted an early release should publicly apologise for their crimes.
[218] M. Proeve and S. Tudor, *Remorse: Psychological and Jurisprudential Perspectives* (Ashgate Publishing, 2010) at 171.
[219] Interview, Judge, Sarajevo, BiH, 12/12/2017.

Here the focus is on the perpetrator and remorse as benefiting the perpetrators themselves. The notion of the perpetrator confronting their crime speaks to the perpetrator's personal reformation. By offering an apology the opportunity is opened for them "to be cleansed from the darkest aspect of their past".[220] This was described by one RS prosecutor who reflected that "show[ing] remorse for the crimes … maybe this would be a moment of catharsis for them".[221]

The emphasis on the acknowledgment of the crime was for most interviewees about the recognition of victims' harm and for societal well-being rather than for the benefit of the perpetrator. These findings illustrate some scholars' assertion that apologies[222] hold significance as they can be a means to "vindicate victims and humble offenders".[223] Bibas' and Bierschbach's assertion was an opinion reflected in this research's findings. Thirteen of the 26 interviewees in BiH who wanted a perpetrator to demonstrate remorse believed an apology should be made public. One prosecutor recognised that measuring remorse was difficult, but proposed that a perpetrator could "back up his remorse with a public apology to victims".[224] In advocating for this public apology the purpose was not apparently for the victims directly but rather for societal recognition of victims. One survivor articulated this, as she emphasised the lack of recognition of victims throughout the interview.[225] She reflected that in the RS none of "the perpetrators … had made public statements, nor did they offer their apologies" and she asserted that "people would believe them more, rather than the victims, if the apology came from them".[226] For her, perpetrators' apology would be an authoritative recognition of the crime as a wrong and the harm caused to victims.[227] Others also took this approach and believed that the Tribunal, not only the perpetrator, had responsibility to make these apologies known. One interviewee advocated "remorse expressed and for people to know about it, with outreach. That would generate so much for the region, a public apology".[228] One interviewee went further and proposed that if a perpetrator was genuinely remorseful, a condition could be

[220] J.M. Coicaud, 'Apology: A Small yet Important Part of Justice' at 108 and P. Gobodo-Madikizela, 'Remorse, Forgiveness and Dehumanization: Stories from South *Africa'* at 21.
[221] Interview, Prosecutor, RS, 22/11/2017.
[222] "even half-hearted apologies" noted by S. Bibas and R.A. Bierschbach, 'Integrating Remorse and Apology into Criminal Procedure' at 143.
[223] S. Bibas and R.A. Bierschbach, 'Integrating Remorse and Apology into Criminal Procedure' at 143 who referenced R. A. Duff, *Punishment, Communication and Community* (Oxford University Press, 2001) at 95.
[224] Interview, Prosecutor, Federation, BiH, 09/11/2017.
[225] See Chapter 8, s.8.7 in relation to the BiH state's lack of recognition to victims.
[226] Interview, RS, BiH, 23/11/2017.
[227] ICC Decision on the review concerning reduction of sentence of Mr Germain Katanga, 13 November 2015, ICC-01/04-01/07, "Katanga's filmed apology … in principle … may be a benefit to victims from an apology being seen, not only by them, but also by the broader community, including those who may be considered 'supporters' of the sentenced person … Such an apology … can also lead to a broader recognition and acknowledgement of the harms that were done to the victims", para. 101.
[228] Interview, Embassy Staff Member, 13/12/2017.

placed on him at early release to "work publicly … on reconciliation, on remorse – speaking about it on TV – and if he is not doing that, go back and serve your sentence".[229] This interviewee recognised that his proposal may have some legal difficulties, but the purpose behind it echoed the assertions of the preceding interviewee who spoke of the value a public apology could have and the assertion that it was for the Tribunal's Outreach programme to make that known.

Although interviewees believed remorse was evidence of rehabilitation, they remained sceptical that it would ever be possible to determine its genuineness. In noting their scepticism, four interviewees associated this with their recollection of Plavšić. Plavšić's hero's welcome and her retraction of remorse frustrated a number of interviewees who argued that with these unrepentant perpetrators the ICTY, as one said, "should have learned … why are they early released? We don't see any change of attitudes … none of them show any remorse ... there should have been proper scrutiny".[230] The interviewee's belief that there had not been proper scrutiny speaks to perceived lack of procedural justice in The Hague. The interviewee was disappointed that the judges had not thoroughly examined the perpetrators' rehabilitation - their personal reformation, which would have been, for this interviewee and 25 others, an expression of remorse.

6.8. Conclusion

This chapter has argued that the Tribunal's Presidents' assessment of the perpetrators' demonstration of rehabilitation lacked rigour and were poorly reasoned. As the decision-making process lacked rigour, decisions fell short of the legitimacy standard of procedural fairness.[231] As the decisions, reasoning on what a demonstration of rehabilitation encompassed was considered misplaced by the majority of interviews, this element of the decision fell short of the procedural justice standard of informed and objective decisions.[232] Thus, the Presidents' determinations on perpetrators' rehabilitation lacked sociological legitimacy in both The Hague and in BiH.

Interview analysis from The Hague explains why this haphazard approach was taken: judges, seemingly, did not distinguish between perpetrators of atrocity crimes and ordinary criminals; an emphasis being placed on enforcement states' obligations to rehabilitate perpetrators rather than

[229] Interview, NGO, Sarajevo, BiH, 13/12/2017. Although interviewees believed remorse was evidence of rehabilitation, they remained sceptical that it ever possible to determine its genuineness. In noting their scepticism many associated this with their recollection of Plavšić, and the "cruelty of [her] false remorse". One interviewee reflected on remorse as a demonstration of rehabilitation and concluded "to apologise ... [it's] nice but … not enough … they're sorry … this procedure should be important. Interview, NGO, RS, BiH, 13/12/2017.

[230] Interview, NGO, Sarajevo, BiH, midday 06/11/2017.

[231] See Chapter 3, s.3.5.2.

[232] See Chapter 3, s.3.5.3.

the judicial duty to consider evidence of rehabilitation thoroughly; and a sense of resignation regarding the impossibility of a rehabilitated perpetrator of atrocity crime. This approach meant that some judges appeared to provide a brushstroke benefit of the doubt to perpetrators, shirk post-sentencing responsibilities and distance themselves from stakeholders in the region, actions and attitudes which are echoed in the following chapters.

This chapter, in addressing the final sub research question, identifying the legitimacy deficit, has also identified one possible means by which future ICTs considering an early release from imprisonment could learn – the value of remorse. Although the majority of interviewees in BiH perceived rehabilitation for perpetrators of atrocity crimes as a challenging task, many of them were open to considering genuine remorse as evidence of rehabilitation. It had to be rigorously assessed, and where perpetrators gave false expressions of remorse, this ought to prompt the court to re-impose the remainder of their sentence.[233] Thus, early release should not be unconditional; remorse had to be genuine and ongoing. Some interviewees asserted that genuine remorse and an apology was important; to others it meant nothing, and they wanted perpetrators to serve their whole sentence, given the gravity of the crime. Others further perceived remorse, not only as a justifiable reason for early release, but as significant for BiH in terms of societal well-being, rather than simply that of the perpetrator or, indeed, their victims. Remorse, the first step being an acknowledgement of crimes,[234] could counter the high level of denialism of atrocities in BiH (discussed Chapter 7). Further, an apology may indirectly assist victims at a societal level. Acknowledgement and an apology would be a recognition of the injustice inflicted on them. [235] It had the potential to confirm victims' harms currently ignored or belittled (detailed Chapter 8). Granting an early release where a perpetrator expresses genuine remorse and makes a public apology may be one means by which to achieve sociological legitimacy. A public apology would be one way to meet the "legitimation through the justification" standard of legitimacy,[236] whereby the perpetrator demonstrates, and an ICT emphasises, that release is justifiable. However, as the interview data showed and this thesis recognises, early release will not be justifiable to all. Nevertheless, even when some members of society are unwilling to listen to or accept, a public apology by a remorseful perpetrator may give rise to social debates and open the space for critical reflections on past atrocities.[237] Further,

[233] See Chapter 5, s.5.5.
[234] E. Goffman, *Relations in Public, Microstudies of Public Order* (Harmondsworth, 1971) on apologies, in Tudor and Proeve, 71.
[235] L. Payne, *Unsettling Accounts: Neither Truth nor Reconciliation in Confessions of State Violence* (Duke University Press, 2008) at 30; and noted in ICC, Katanga para. 101.
[236] See Chapter 3, s.3.5.5.
[237] L. Payne, *Unsettling Accounts: Neither Truth nor Reconciliation in Confessions of State Violence* (Duke University Press, 2008) at 34.

remorse and a public apology for the crimes would symbolise that the perpetrator has accepted the moral condemnation of punishment. As the following chapter outlines, many interviewees perceived the purpose of punishment (imprisonment) as being an authoritative assertion of an unjustified harm done to victims (Chapter 7, s.7.4.2). Therefore, granting an early release to a perpetrator who had expressed genuine remorse and apologised for their crimes may be less aggravating to sections of society. The perpetrator would have actively dissociated from their crime: early release would have been connected to the purpose of punishment, and the perpetrator would have accepted that they had unjustly committed a harm and that their punishment was deserved. Early release would not have been a poorly reasoned process whereby judges would be perceived as forgetting that they had condemned the crime and the perpetrator at sentencing as they now released them early without justification.

Finally, genuine remorse as the understanding of rehabilitation speaks to the human rights framing of rehabilitation: perpetrators' reformation and their reintegration into society. The criminal justice system, including rehabilitation, is meant to serve not only the perpetrator but all of society.[238] Perpetrators of atrocity crime, removed from society as they serve their sentence, are nevertheless due to return to that society. As they are granted UER, most do return.[239] The following chapter discusses the impact of UER in BiH, where perpetrators do not express remorse for the harms they have caused to victims. It outlines the negative repercussions, the "shit-storm"[240] UER has where perpetrators return early and unrepentant.

[238] R. Mulgrew, *Towards the Development of the International Penal System* (Cambridge University Press, 2013) at 213, referencing UN Basic Principles for the Treatment of Prisoners, 1990, Principle 4 – "responsibility of prisons for the custody of prisoners and for the protection of society against crime shall be discharged in keeping with a State's other social objectives and its fundamental responsibilities for promoting the well-being and development of all members of society".

[239] From the determinations it appears only Delić, Erdemović and Landžo requested not to be returned to the region.

[240] Interview, Judge, The Hague, afternoon 30/01/2017. The judge raised the notion of a "shit-storm" on return of high-profile perpetrators, not perpetrators of atrocity crimes in BiH, returning to society and being hounded by the media and the public. But this phrase captures the controversial nature of high-level perpetrators' return.

Chapter 7: UER Negating the Expressive Value of the ICTY's Punishment

7.1. Introduction

This chapter argues that the UER of unrepentant perpetrators of atrocity crimes does a disservice to the two principal expressive purposes of punishment - moral condemnation and overall norm projection handed down by the Tribunal. This argument is based on the analysis of interview data which concurred with the existing propositions of scholars who posit that the most fitting purpose of punishment for atrocity crimes is its expressive capacity, that is, its authoritative moral condemnation of the crimes. The preceding chapter argued that perpetrators' rehabilitation should be measured on a rigorous examination of their acceptance of the moral wrong of their actions rather than mere acceptance of illegality. Interview data, where several of the interviewees convincingly spoke of the value of perpetrators' remorse and apology (Chapter 6, s.6.7) as well as the ICC RPE requirement for perpetrators to demonstrate a genuine dissociation from their crime, supports the argument that their remorse is fundamental to rehabilitation. The emphasis placed on remorse, as a recognition of the moral wrong, the harm caused to victims, speaks to why we punish in the first instance.

This chapter begins by setting out how the expressive value of punishment as moral condemnation of the crimes was perceived by interviewees, as an important element of the Tribunal's purposive legitimacy (its aims and values).[1] This was articulated by the Tribunal itself (s.7.2) and the chapter argues that this justification for punishment is, indeed, the most fitting for atrocity crimes. Nevertheless, it recognises and addresses the fact that the expressive capacity for punishment raises challenges, primarily due to multiple audiences, that the Tribunal (and, indeed, any international criminal tribunal or court) addresses, who may have different priorities (s.7.3). This section, although not strictly linked to perceived negation of the expressive element of punishment, is relevant here as it continues to answer the second part of the Research Question, of why the early release practice happened, and how the stakeholders perceived its legitimacy and outlines why. Sections 7.4.2-7.4.3 detail the proposed norm. The chapter discusses the extent to which UER undermines this norm to the different audiences that the punishment addresses, and why (s.7.4.4-7.4.5). Further, it outlines how UER projected unintentional messages,[2] and discusses their significance in BiH (s.7.5). The chapter begins to answer the final aspect of the thesis' Research Question concerning the impact of

[1] See Chapter 3, s.3.4.2.

[2] T. Meijers and M. Glasius, 'Trials as Messages of Justice: What should be expected of International Criminal Courts' (2016) *Ethics and International Affairs* 30(4): 432.

UER on the overall legitimacy of the Tribunal in BiH (s.7.6). It does so by discussing the findings relating to the other valuable elements of expressivism, its truth-confirming nature,[3] which was perceived to have been satisfied during the trial, the finding of guilt, and [some] subsequent punishment. Although the punishment was ended early by UER, these expressivist purposes were not ultimately undone.

7.2. The Declared Expressive Value of Punishing Atrocity Crimes

For the Tribunal the two main stated purposes in sentencing perpetrators[4] were retribution and deterrence.[5] Over the course of its lifetime, the judges tailored retribution to encompass what they had initially labelled "reprobation", effectively, moral condemnation. The Tribunal's first judgment concluded that "the International Tribunal sees public reprobation and stigmatisation by the international community" as a means to "express its indignation over heinous crimes and denounce the perpetrators" and thus was "one of the essential functions of a prison sentence for a crime against humanity".[6] Broadly, therefore, punishment, embodied in a prison sentence, is a tangible denunciation of the crime as a whole, the criminal act itself (*actus reus*), and its motivation, the criminal's mind-set (*mens rea*). The Erdemović judgment above makes explicit three matters here. First, is that the Tribunal positions itself to speak for the "international community' as they determine an appropriate sentence.[7] Second, they are expressing the international community's "indignation" at the crimes. Third, they are denouncing the perpetrator of these crimes. The first two elements mimic the Tribunal's first President's pronouncement of the legitimacy of international criminal tribunals more broadly; their legitimacy in prosecuting and punishing those found guilty, on the basis of "peremptory norms of international law … based on the values common to the whole of humanity".[8] Cassese labelled this "universal values legitimacy" which was described by Sandholtz in relation to the "purposive legitimacy" of the ICTY. This purposive legitimacy was based on the

[3] M. Drumbl, *Atrocity, Crime and Punishment* (Cambridge University Press, 2007) "Expressivism also transcends retribution and deterrence in claiming as a central goal the crafting of historical narratives, their authentication as truths, and their pedagogical dissemination to the public" at 173 – as legal process can narrate history and thereby express shared understandings of the provenance, particulars, and effects of mass violence; punishing the offender contributes yet another layer of authenticity, at 174.

[4] Albeit, as above, not articulated in all its judgments or consistently.

[5] B. Holá, 'Sentencing of International Crimes at the ICTY and the ICTR' (2012) *Amsterdam Law Review* 4.4: at 7.

[6] *The Prosecutor v. Drazen Erdemović*, 29 November 1996, Sentencing Judgement, para. 64.

[7] Implicit in this is that it does so on the basis that these actions violate universal norms – 'purposive' or 'universal values legitimacy', articulated by Cassese.

[8] A. Cassese, 'The International Criminal Court and Tribunals: The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice' (2012) *Leiden Journal of International Law* 25: at 492 as noted in Chapter 3.

universally recognised norms and on the "fundamental dignity and worth of the human person".[9] It is also noteworthy that in the Erdemović judgment the judges undertook a review of previous trials' outcomes for crimes against humanity. In doing so, there was an implicit recognition of the distinct nature of these crimes and their desire for their punishment to reflect this. Taking this review into account, the Tribunal's first judgment determined that moral condemnation was the most appropriate purpose for punishing atrocity crimes.

The words "indignation"[10] and "reprobation"[11] adopted by the judges at the Tribunal resonate with the language of legal philosopher Feinberg, frequently cited when scholars have advocated for the expressive value of punishment to be applied to atrocity crimes.[12] Other scholars[13] have justified international punishment independently, based on its expressive capacity, its ability to authoritatively express moral condemnation of the crime, and have added new elements to Feinberg's proposition (s.7.4.2-7.4.3). Interviewees in BiH voiced a number of Feinberg's propositions[14] and emphasised other elements identified by Feinberg who asserted that "[p]unishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority himself or of those 'in whose name' the punishment is inflicted."[15] First, addressed below, is the authoritative disavowal of the crime, and second, the vindication of the law, specifically in this instance, international criminal law and the norm underpinning this: that is, perpetrators of gross human rights violations, which atrocity crimes are, should be prosecuted and punished.[16] Hence, hereinafter, validation of the law is referenced as the "norm projector". The norm underpinning

[9] W. Sandholtz, 'Creating Authority by Council: The international criminal tribunals' in B. Cronin and I. Hurd (eds.) *The UN Security Council and the Politics of International Authority*, (Routledge, 2008) at 134.
[10] D. Mrđa, Sentencing Judgement, 31 March 2004, para. 14, citing Aleksovski, Appeals Judgement, 24 March 2000, para. 185.
[11] *The Prosecutor v. Drazen Erdemović*, 29 November 1996, Sentencing Judgement, para. 64.
[12] R. Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law' (2007) *Stanford Journal of International Law* 43: 39–94, B. Wringe, 'Why Punish War Crimes? Victor's Justice and Expressive Justifications of Punishment' (2006) *Law and Philosophy* 25: 159–191 at 176.
[13] Amann, Drumbl, Duff, Fisher, Meijers and Glasius, Luban and Wringe.
[14] These four factors were as follows: first, an 'authoritative disavowal of the crime', punishment is a means for society to express its condemnation of the crimes, which was subsequently negated at UER; second, symbolic non-acquiescence, punishment signalled that the international community was not complicit in the atrocities; third, it was a vindication of international criminal law, it put into action the black letter law; fourth, it "informally absolves others of blame". This is summed up by his statement that "The condemnatory aspect of punishment does serve a socially useful purpose: it is precisely the element in punishment that makes possible the performance of such symbolic functions as disavowal, non-acquiescence, vindication, and absolution." J. Feinberg, 'The Expressive Function of Punishment' in *Doing and Deserving, Essays in the Theory of Responsibility* (Princeton University Press, 1970) at 115.
[15] J. Feinberg, 'The Expressive Function of Punishment' at 95.
[16] K. Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (Norton, 2011) at 255; and M. Drumbl, *Atrocity, Crime and Punishment* (Cambridge University Press, 2007) 174. Generally, atrocity crimes are noted as grave human rights violations without any explicit rationalisation, see S.C. Carey and S.C. Poe (eds.) *Understanding Human Rights Violations* (Ashgate, 2004).

international criminal law, this thesis argues, is victims' intrinsic worth, set out in s. 7.4.2. This thesis sought to uncover why the ICTY, as a criminal tribunal, fell short of its pledge to fully punish perpetrators, and the extent to which this non-fulfilment had an impact on the Tribunal's legitimacy.

7.3. The ICTY's Audiences and their Multiple Perceptions of the Tribunal's Purposive Legitimacy

The belief (asserted by the Tribunal itself) that punishment is an expression of moral condemnation of the crimes and, ultimately, the norm projection, implies that this "expression" has a recipient, an audience or indeed audiences.[17] The ICTY, as outlined in Chapter 4, had multiple audiences, some of which were simultaneously stakeholders.[18] The fact that the ICTY had multiple audiences hints that the purposive legitimacy of the Tribunal was vulnerable to contestation from the outset. These different audiences may have perceived these expressive capacities of punishment differently; and, as highlighted in Chapter 5, the considerable weight of the enforcement state indicated, and reportedly noted by a former President,[19] that the Tribunal did not always succeed in balancing the differing priorities[20] of these audiences.[21] By way of example, pertinent for UER, if one adheres to claims made that the Tribunal, its initial primary purpose of expressivist function of punishment, for at least one audience (some UNSC Member States), was of non-acquiescence to the grave breaches of IHL being perpetrated in the FRY. Some observers argued that the Tribunal was established as a means for the UNSC to express non-acquiescence to the atrocities being committed, to rid themselves of the accusation of ignoring the widespread killing.[22] This expressive capacity was articulated by Feinberg, albeit not describing punishment for these crimes. Feinberg sets out the motive of the "non-acquiesce" capacity of punishment as arising from "the Kantian idea that in failing to punish wicked acts society endorses them and thus becomes *particeps criminis*".[23] With regard to the UNSC Resolutions, which established the Tribunal, the first two stated purposes for the

[17] Amann, Meijers and Glasius, Duff, Luban, Fisher and Wringe.
[18] Stakeholders being those who in contrast to an audience, have a tangible interest in the ICTY's work and/or its outcomes.
[19] Discussed in the next chapter, according to one Victims' Association the former President had explained that the practice of early release was a consequence of the enforcement state rather than being, at least on the RPE of the Tribunal the sole decision of the President.
[20] Priorities over the aims of the Tribunal. For a description of purposive legitimacy see Chapter 3, s.3.4.2.
[21] It was noted by one senior member of staff at the Tribunal (Interview, 02/02/2017) that due to the *ad hoc* nature of the Tribunal it was under constant pressure to close, despite many Victims Associations in BiH not wishing for it to do so. See D. Orentlicher, *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia* (Oxford University Press, 2018) at 143.
[22] J. Meernik and K. King, 'Crimes and Punishment: How the ICTY Distinguishes Among Massive Human Rights Violations' in S.C. Carey and S.C. Poe (eds.) *Understanding Human Rights Violations* (Ashgate, 2004). Meernik and King list a number of authors who argued initial criticism of the ICTY was that it was an "attempt by the major powers to absolve themselves of responsibility for their inaction', 147; referencing: R. Holbrooke, *To End a War* (Random House, 1998) at 190; Y. Beigbeder, *Judging War Criminals* (St. Martin's Press, 1999) at 46; G. Bass, *Stay the Hand of Vengeance* (Princeton University Press, 2000) at 207.
[23] J. Feinberg, 'The Expressive Function of Punishment' in *Doing and Deserving, Essays in the Theory of Responsibility*, at 103.

Tribunal, *prima facie* give credence to these authors' propositions. The Resolution asserted that the Tribunal would "put an end to such crimes" and "take effective measures to bring to justice the persons who are responsible for them".[24] This non-acquiescence function of the Tribunal's purpose of punishment has been summed up best by G. Robertson who posited that "the ICTY was established by the Security Council … as if to stop the world laughing at its impotence".[25] The word impotence is used by Robertson to emphasise that the UNSC was the international body which had "primary responsibility for the maintenance of international peace and security".[26] Based on the wording of the UNSC Resolution, one of the stated primary purposes of the ICTY was to fulfil that mandate, which it asserted it would do by indicting perpetrators, with a view to incapacitate them, by bringing them to trial.[27]

This perceived purpose of punishment was narrow and, as detailed in Chapter 4 (s.4.3), the Tribunal itself added additional purposes - broader ones as its judges wrote judgments, its President and Prosecutor reported annually to the UNSC, and it developed a website for the public at large. One such stated purpose was that punishment symbolised a vindication of victims' value,[28] which resonated with a significant number of interviewees in BiH (s.7.4.2). This chapter argues, based on interview analysis, that this additional purpose was the core of the norm projection element that a number of scholars have advocated for, [29] and was overlooked. The impact on victims' perceptions of UER is the theme of the next chapter, but the relevant aspects of the concept of victims' value being vindicated by the act of punishment is discussed in Sections 7.4.2 - 7.4.3, as it is integral to the norm projection expressive value of punishment, which is subsequently negated at UER.

7.4. The Impact of UER on the Expressive Values of Punishment

The finding that moral condemnation was negated by UER spoke to many interviewees' perceptions of the Tribunal's key purpose in punishing these crimes. Of the 57 interviewees in BiH, 21 individuals articulated that punishment was about sending the "message"[30] that the crimes were wrong and warranted punishment, using phrases such as "to show", "send the message", "to say" etc. They

[24] UNSCR 808, 22 February 1993.
[25] G. Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (Penguin, 2012) at 446.
[26] UN Charter, Chapter V, Article 24 on the 'Functions and Powers' of the UNSC; see: https://www.un.org/en/sections/un-charter/chapter-v/index.html
[27]UNSCR 808, 22 February 1993.
[28] See Chapter 4, s.4.3.1.
[29] Drumbl, Luban and Amann.
[30] Interviewees used phrases such as 'to show', 'message' followed by a range of audiences to which the Tribunal was showing or messaging, which was not limited to those in BiH, victims, the community but on occasion 'the world'

spoke of the purpose of punishment having an expressive element. To do justice to this finding, the suitability of the expressive capacity of punishment for atrocity crimes, the two most relevant elements of Feinberg's theory are laid out, and the following sections outline how these elements are negated at the grant of UER of unrepentant perpetrators. The first aspect of Feinberg's expressive capacity that is negated by UER is the authoritative disavowal of the crimes; the second aspect is the validation of the law. For this thesis, in part, examining punishment for atrocity crimes, this validation of the law is the validation of a particular norm: crimes committed against a person, or persons, based on discrimination against them as *another*[31] is inherently wrong and without any justification; consequently, UER negates this norm projector of punishment.

7.4.1. Authoritative Disavowal Diluted at UER

The Tribunal seated in The Hague, established by the UNSC in New York, with foreign judges[32] elected by UNSC Members,[33] embodied to many in BiH the rather nebulous international community, and the Tribunal itself articulated that it spoke on behalf of the international community. The Tribunal indicted those suspected of atrocity crimes, held public trials which were broadcast live on television (from 2000 onwards) across the FRY,[34] and sentenced convicted perpetrators to a term of imprisonment. Punishment represented an authoritative disavowal of the crimes. In terms of Feinberg's proposals, the Tribunal was categorically stating that the perpetrator had "no right to do what he did".[35] Yet, this punishment was rarely fulfilled in practice. For ten of the interviewees in BiH, UER was perceived as a direct negation of that condemnation. This sentiment was articulated by one interview who queried:

> can you morally condemn a certain person, a person's behaviour … your condemning … is not a mere act of condemning but it has consequences and in this case it's a prison sentence and if you do away with this … what remains of this initial act … the signal … of this moral condemnation [is a] question mark. And then we get back to the beginning … which is how far is it legitimate, or even legal to grant … an early release? [36]

For this interviewee, a non-native working for an IGO, a lawyer, with over ten years of professional experience in BiH, the expression of moral condemnation was realised via the prison sentence.

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[31] Emphasis added.
[32] See ICTY judges: https://www.icty.org/en/about/chambers/judges
[33] See: https://www.irmct.org/en/about/judges
[34] E. Stover, *The Witnesses*, noted that coverage was "irregular at best" due to lack of funding, at 144.
[35] J. Feinberg, 'The Expressive Function of Punishment' in *Doing and Deserving, Essays in the Theory of Responsibility,* at 103.
[36] Interview, IGO, Sarajevo, 21/12/2017.

Condemnation by words alone would not be adequate, as he noted, it has to have "consequences". When the perpetrator was granted UER, the sentence was not fulfilled. Further, the phase, "then we get back to the beginning" suggests that he, an audience of the message, looks back to the initial signal and queries the act of early release.

There was a notion of the trajectory of the declared sentence being undermined by the grant of UER. The interviewee above queried, "what remains of this initial act" hints at the notion of the act being thwarted in some way. The sense of a trajectory losing its course was expressed by a BiH Prosecutor who was frustrated by UER and asserted that the sentence declared should simply be fulfilled. He noted that the ICTY "should stick to the purpose of punishment – deterrence and sending the message".[37] Another interviewee, a self-identified Serb, working with another IGO, was bitterly disappointed with UER. Through his work, he was engaged with smaller communities, which had often been badly affected by the war. When asked if he believed UER could be reconciled with moral condemnation of the crime, he responded "if you want to give this message then we should not more or less change that narrative and provide an early release … it's wrong messaging".[38] Although he did not speak of legitimacy, his phrasing speaks to his understanding of the purposive legitimacy of the Tribunal and this category of legitimacy being negated at the grant of UER. His wording, the phrase "if you want to give this message", indicates that he perceived an aim of the Tribunal as expressing moral condemnation, and that he perceived the grant of early release as a contradiction - "we should not … change that". His concluding thought, of "wrong messaging", speaks to how he perceived the purposive legitimacy of the Tribunal being negated by the act of UER.

These three quotations capture two elements of Feinberg's own example of an act of an authoritative disavowal of a wrong committed, and the notion of the expression of this disavowal to a wide audience. The punisher is not addressing the perpetrator alone in condemning their act, as noted by the Prosecutor in asserting that the purpose was "deterrence" in terms of general prevention rather than specific deterrence for that perpetrator. Therefore, the message was to an audience beyond the sentenced perpetrator. Feinberg uses the analogy of a nation state punishing a pilot of its own who has shot down another country's aeroplane and asserted that the punishment:

> tells the world that the pilot had no right to do what he did, that his government does not condone that sort of thing. It testifies to government A's recognition of the

[37] Interview, Prosecutor, Sarajevo, RS, 17/11/2017.
[38] Interview, IGO, Sarajevo, 01/12/2017.

> violated rights of government B in the affected area and, therefore, to the wrongfulness of the pilot's act.[39]

The purpose of punishment is that of a disavowal – the punisher "does not condone" the wrongfulness of the act. Feinberg here hints at the *why* element, although he does not elucidate it. The wrong that has occurred is that the punished pilot has violated the rights; here those rights are of the other state by virtue of their pilot being shot down, which is denoted as the wrong and consequently punishment follows. The reason why punishment is required is that a wrong has been committed. Before exploring further how this *why* element (the norm projection) is negated at UER, let us first examine the underlying reasons why people (scholars, and most importantly, a significant number of interviewees in BiH) perceive these crimes as wrong and as requiring punishment.

7.4.2. Why this Authoritative Disavowal? A Vindication of Victims' Value

Although Feinberg's work scarcely mentions victims, and he is not writing in terms of atrocity crimes, a parallel can be drawn from the above quotation in relation to the "violated rights" of government B, by virtue of having their pilot shot down, to the context of atrocity crimes and subsequent punishment by the ICTY. Feinberg implicitly asserted that there is a world order that recognises that violent crimes committed against *any* innocent individual are morally wrong – regardless of which government they belong to and any government should punish such acts.[40] Feinberg's argument speaks to there being an underlying sentiment which is so deeply ingrained that scholars frequently feel no need to explicate it. As noted by Sikkink, "prohibition of murder, rape and other violent crimes exist in the criminal law of virtually all societies and cultures, there are obvious moral rules for which people believe that punishment is deserved".[41] Feinberg's argument is that punishment validates the law (s.7.4.3). This thesis draws on Hampton's theory, which explicates *why* the law itself is valid. This, in turn, speaks to the significance of the norm projection element of punishment for atrocity crimes, and the subsequent harm that is done at the blanket grant of UER for perpetrators.

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[39] J. Feinberg, 'The Expressive Function of Punishment' in *Doing and Deserving, Essays in the Theory of Responsibility*, at 102.

[40] The ICTY can be read as Feinberg's "government A". The pilot who is been punished (perpetrator from the FRY but who belongs to a common humanity), is being punished due to the fact that he has shot down another pilot, not belonging to government A. This implies that although the pilot does not belong to government A, in fact the pilot belongs to another government, (government A wishes to recognise that the act is wrong and requires recognition. That is the ICTY, an outside body, punishes for the death of victims inside of a sovereign state (the states of the FRY). Fundamentally, it sends the message, or "tells the world" that the perpetrator was wrong.

[41] K. Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (Norton, 2011) at 255.

This element of the expressive value of punishment, a recognition of victims' value, was proposed explicitly by Hampton, and supported by Glasgow,[42] though similarly to Feinberg, neither was justifying punishment in the context of atrocity crimes. Duff, however, implicitly extends this underlying value into the auspices of ICL as he asserted that "some kind of crimes are properly our business, in virtue of our shared humanity with their victims".[43] For Hampton and Glasgow, punishing the perpetrators is an act of recognition that the perpetrator has purposely harmed the victim and is deserving of punishment. Punishment is the means by which society acknowledges the victim's value – a means of expressing to the victim, to the perpetrator and to society at large that all human beings have an intrinsic value. As argued by Hampton:

> retribution is a response to a wrong that is intended to vindicate the value of the victim denied by the wrongdoer's action through the construction of an event that not only repudiates the action's message of superiority over the victim but does so in a way that confirms them as equal by virtue of their humanity.[44]

By punishing the perpetrator, their acts are condemned, and the punishment humbles them. As Hampton explained, "retribution is … inflicted to nullify the wrongdoer's message of superiority over the victim".[45] This reason for punishment, the repudiation of the perpetrator's message of superiority over the victim, and the recognition of the victim's worth, was articulated by one interviewee in BiH, in relation to perpetrators of atrocity crimes. She argued, "sentencing somebody to prison … does [give] satisfaction to survivors … it sends a message … [it] basically shows that the world recognises the amount of crime, that the victims were innocent and that persons, or groups of people have been guilty for what they have been convicted of".[46] Additionally, the interviewee affirmed that the expressive act of punishment has audiences and she identified two. First, victims are an audience, as she reasons that survivors, direct or indirect victims, are being provided with some satisfaction by the perpetrator's wrong being punished. Second, more broadly, this punishment projects to the world that the perpetrator has done wrong, and that wrong being that they harmed victims.

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[42] A. Glasgow, 'The Expressivist Theory of Punishment Defended' (2015) *Law and Philosophy* 34: 601–631.
[43] A. Duff, 'Authority and Responsibility in International Criminal Law' in S. Besson and J. Tasioulas (eds.) *The Philosophy of International Law* (Oxford University Press, 2010) at 601 referencing R. Gaita, *Good and Evil: An Absolute Conception* (Macmillan, 1991).
[44] J. Hampton, 'Correcting Harms Versus Righting Wrongs: The Goal of Retribution' (1992) *UCLA Law Review* 39: 1659-1701 at 1686.
[45] J. Hampton, 'Correcting Harms Versus Righting Wrongs: The Goal of Retribution' at 1698.
[46] Interview, NGO, Sarajevo, 27/10/2017.

These multiple audiences view UER through different lenses from the outset. As Meijers and Glasius noted, audiences of international criminal trials, are not "tabula rasa",[47] a blank slate. Rather, audiences view an institution and its actions from the vantage point of their own lived experiences. This meant from the outset that different audiences (including stakeholders) could perceive the Tribunal as having different aims or purposes (noted s.7.3). Additionally, external influences continue to cloud the lenses, that is, actions are "filtered" [48] to these audiences through different mediums, such as media coverage and the political discourse in the country. Accordingly, these multiple audiences may require the messages to be delivered differently in order to navigate these lenses. That there are multiple audiences who perceive different messages projected by trials, based on the lenses through which they are received, is similarly the case that they see the UER differently, which was evident as interviewees in BiH articulated, detailed in section 7.5.

7.4.3. Punishment as a Vindication of International Criminal Law and its underlying Norms

The proposition that international criminal trials and subsequent punishment act as an expression of vindication of ICL, and, consequently, as a means to further the norm underlying ICL, is advocated by a number of scholars.[49] Sloane paraphrased Feinberg's expressive capacity of punishment as being a means to "validate the law" to read, in the context of international criminal law, as being a means to "vindicate international human rights norms and the laws of war".[50] Before going further, however, it is important to identify the human rights norms that Sloane is referring to here, as this section addresses the extent to which, and why, these norms were perceived to be challenged by UER. Sloane identified the norm as international human rights and international humanitarian law. He referred to a distinct group of international human rights norms. These norms have best been captured by Sikkink who argued that there was a crystallisation of the no impunity norm for *mass* human rights violations.[51] The no impunity norm derived from civil society and victim groups' advocacy from the late 1980s, which culminated in the early 2000s. Sikkink argued that the no impunity norm for mass human rights violations derives from the basic hallmark of all humans intrinsically sharing the moral reasoning that people deserve to be punished for breaking moral rules; which can be demonstrated since prohibitions of murder, rape, and other violent crimes exist

[47] T. Meijers and M. Glasius, 'Trials as Messages of Justice: What should be expected of International Criminal Courts' at 443.
[48] T. Meijers and M. Glasius, 'Trials as Messages of Justice: What should be expected of International Criminal Courts' at 443. See s.7.5.
[49] M.D. Amann; M. Drumbl, R. Sloane, T. Meijers and M. Glasius, D. Luban, A. Duff, K. Fisher and B. Wringe.
[50] R. Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law' at 71 - altering Feinberg's 'validation of law'.
[51] K. Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (Norton, 2011) at 255.

in the criminal law of virtually all societies and cultures.[52] In the context of atrocity crimes, it is argued that these shared norms are distorted. Drumbl emphasised that atrocities occur in a different context, where these intrinsic shared moral values become overridden by other values propagated by leaders – based on group identity over core human identity. For example, the violation of another group's human rights, murder and forced displacement becomes justified on the basis of self-defence from a threat of another group or an alleged inferiority of the other group. As Drumbl asserted, this norm projection through consistent and adequate punishment could lead to internalisation of these norms by individuals which could act as a bulwark to indoctrination in conflict situations, where elites attempt to normalise hatred.[53] The norm proposed by Drumbl for the context of atrocity crimes was the "universal repugnance of discriminatory group-based killings".[54] He did not elucidate *why* there was a universal repugnance. As suggested above, this may have been simply because Drumbl himself has internalised the morality that violent discriminatory crimes are intrinsically morally wrong. For Drumbl, a key audience for this moral condemnation is the everyday citizen, a potential perpetrator. Luban articulated a similar argument, although his audience appears to be political elites and their followers. Luban, whose focus was on trials rather than punishment, nevertheless, asserted that "punishment following conviction remains an essential part of any criminal process that aims to project a no-impunity norm".[55] Luban described this "norm projection"[56] as "international criminal law's moral truth", which, he argued, was the "criminality of political violence against the innocent, even when your side hates the innocent as an enemy".[57]

Although Luban described the norm he did not articulate the reason behind the norm. This reasoning was proposed by Fisher. Fisher suggested that punishment should support the norm of a liberal society whose members have the right to socially and politically organise, and that, when this right is violated, accountability shall be applied, via punishment, by the international community at large, where a sovereign state is unwilling to do so. The international community in punishing perpetrators of these crimes will, therefore, affirm this global order. Although few interviewees explicitly articulated the *why* of Fisher's norm, the notion of norm projection being at the heart of the expressive purpose of punishment was reflected across the range of stakeholders interviewed –

[52] K. Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (Norton, 2011) at 255.
[53] M. Drumbl, *Atrocity, Crime and Punishment* (Cambridge University Press, 2007) at 174.
[54] M. Drumbl, *Atrocity, Crime and Punishment* (Cambridge University Press, 2007) at 174.
[55] D. Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law' in S. Besson and J. Tasioulas (eds.) *The Philosophy of International Law* (Oxford University Press, 2010) at 575.
[56] D. Luban, 'After the Honeymoon Reflections on the Current State of International Criminal Justice' (2013) Journal of International Criminal Justice 11: 505-515 at 509.
[57] D. Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law' at 577.

judges, lawyers, NGOs, IGOs and VAs, who are in turn, a number (albeit not all)[58] of the Tribunal's audiences.

7.4.4. The Audiences of the Norm Projection and its Negation at UER

This section examines the interview data, predominately from BiH, which indicated that norm projection was perceived as a primary purpose of the ICTY. Several interviewees emphasised that when the ICTY punished perpetrators it signified that the international community abhorred perpetrators' motivations for committing the crimes. These interviewees, in effect, expressed Drumbl's proposition that the ICTY'S punishment signified the "universal repugnance of discriminatory group-based killing",[59] which in turn was a recognition of the worth of the victims of those crimes. When this punishment was cut short by UER the purposive legitimacy[60] of the Tribunal was, therefore, being undermined by the Tribunal itself, as it was not fulfilling its primary purpose – holding these perpetrators to account for their crimes. Consequently, for these interviewees UER was perceived as illegitimate.[61] Section 7.3 outlined the multiple audiences who viewed the ICTY and this section outlines the extent to which interviewees in BiH believe these audiences are important, as well as interviewees' beliefs as to how UER can negate the norm projection element in the eyes of these audiences.

Analysis of the interview data fits with Amann's argument that, for expressivist theorists of punishment, "the intended audience … is not just the wrongdoer … it is also the Everyone … the law-abider and the law-maker, the activist and the private citizen, and even the potential victim, today and tomorrow".[62] The idea that "the everyone" is addressed came out strongly in interviews in BiH. Over one-third perceived the ICTY punishing perpetrators of atrocity crimes committed in the Balkans as having significance beyond their own borders.[63] Additionally, interview analysis reflected

[58] The perpetrators themselves are an audience although this thesis limited itself to post-conflict society who would be more readily accessible.
[59] M. Drumbl, *Atrocity, Crime and Punishment* (Cambridge University Press, 2007) at 174.
[60] See Chapter 3, s.3.4.2, the initial stated purpose of the ICTY was prosecution of war crimes and crimes against humanity, which was effectively the recognition of the international human rights law, which is, at its core, fundamentally the intrinsic value of every human being.
[61] In responding to the sub-research question on how outside stakeholders (those in BiH) perceived the legitimacy of UER.
[62] D.M. Amann, 'Group Mentality, Expressivism, and Genocide' (2002) *International Criminal Law Review* 2: 93-143 cited in R. Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law' at 85.
[63] Nineteen interviewees in BiH expressly referenced the purpose of punishment as showing 'the world', 'everyone', 'other leaders' that such crimes were wrong, should or will be punished. Thus, indicative of this recognition of the ICTY having a broader audience than the Balkan region.

Amann's proposition that the message was for future as well as for current audiences. First, the relevant audiences are discussed.

Scholars and observers have proposed that political and social groups (both elites and their followers) are a key audience of the no impunity norm.[64] Fisher argued that this no impunity norm should be expressed by focusing on punishing high-level perpetrators[65] of atrocities. This prosecutorial strategy, she asserted, would affirm a global order wherein groups of human beings are free to organise socially and politically. Luban recognised both these elites and followers as relevant audiences of what he labelled the "norm projection".[66] Punishment for people who commit mass human rights violations expresses the no impunity norm. Luban suggested that this norm projection may have a deterrent effect, that foot-soldiers internalise the "moral unacceptability of [discriminatory and violent] politics".[67]

This proposition of any political and social group being a key audience who receive the message of perpetrators of atrocity crimes being punished was echoed in BiH. Interviewees recognised other members of the international community as being an audience for the ICTY. The President of a regional court in BiH argued that punishment of atrocities "sends a message to the entire world that this kind of behaviour during war, which is a specific situation, is not allowed and it should not happen again".[68] Likewise, a current judge at the War Crimes Chamber (WCC) said that "the ICTY … sends a message, to the people of Myanmar now."[69] These two judges perceived the ICTY as being able to send a powerful message not only to the region but across the world. Additionally, that the message outlived the Tribunal was reflected by the judge's use of the word "now". He believed that people in Myanmar were aware of the message now. Further, these people could encompass not only the leaders instigating the crimes but their followers too.

As the conviction and subsequent punishment projects the no impunity norm, does the early termination of the punishment undermine the no impunity norm, or does UER send another

[64] Drumbl, Luban and Damaška.
[65] K. Fisher, *Moral Accountability and International Criminal Law: Holding Agents of Atrocity Crimes Accountable to the World* (Routledge, 2012) at 6,9 and referencing Osiel emphasising the importance of distinguishing different types of perpetrators.
[66] D. Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law' at 576.
[67] M. Drumbl, *Atrocity, Crime and Punishment* (Cambridge University Press, 2007) at 174.
[68] Interview, Judge, Federation, BiH, 21/11/2017.
[69] Interview, Judge, WCC, Sarajevo, BiH, 18/10/2017.

message? Unintentional as they may be, the answer for the several interviewees in BiH was a clear "yes" (detailed in s.7.4.5 and s.7.5). In terms of receiving audiences, UER by the ICTY not only had a negative impact for the societies in the FRY, it also sent a negative message to others. For one interviewee, UER was a direct contravention of the no impunity norm. Most worryingly for her, state leaders who instigate the atrocity crimes received this message. She asserted that UER for perpetrators of atrocity crimes is:

> sending the message to the world that crimes can be committed. You will be released, you can change the border[s] of territories, you can forcibly move people, and you can change ethnic structures of one nation for your own personal interest.[70]

This interviewee worked with a number of victims of the war, who are now victims of displacement as a consequence of the war's conclusion. They are internally displaced, removed from their family home due to the terms of the Dayton Agreement, which divided the country along ethnic divides, and, consequently, many displaced did not return to their pre-war homes.[71] For her, UER was particularly offensive as she witnessed directly the on-going harms experienced by displaced people, victims of these perpetrators who were now being granted early release from their punishment. The matter of victims suffering as ongoing contrasting to that of UER perpetrators is developed in Chapter 8, s.8.2. This interviewee's comment, however, indicated that she perceived parallels with other countries experiencing atrocities whereby the crimes' purposes, ethnic cleansing, are achieved, and through UER this mass displacement, ongoing, is being relativised for current and would be high-level perpetrators.

Another interviewee referred to the bitter irony of UER for political leaders at the national level. He emphasised the same matter of contention, the significance of the crimes and their impact - ethnic cleansing which resulted in mass displacement. He reflected on the Bosnian-Serb political leaders, Plavšić and Krajišnik, who had called for areas to be ethnically cleansed.[72] When released, they had

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[70] Interview, NGO, Sarajevo, BiH, 14/12/2017. - This interviewee was disappointed with UER. She had worked closely with victims, including Internally Displaced People and understood first-hand the long-term consequences for them. Twenty years after the war, the UNHCR in 2015, reported that 98,000 people remained internally displaced in BiH, and the issue of minority returns was still an issue (minority returns of ethnic groups in 'ethnically cleansed areas)'. See: http://reporting.unhcr.org/node/15810

[71] D. Orentlicher, *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia* (Oxford University Press, 2018) at 93 – "the division of their country under the terms [of the Dayton Agreement] many Bosniaks experience as the ratification of ethnic cleansing' as many of the victims have not been able to return to their former homes; and M. Buljubasic and B. Holá 'Perpetrators on Trial: Characteristics of War Crime Perpetrators Tried by Courts in Bosnia and Herzegovina & ICTY' citing Pejanović, 2010) in A. Smeulers, M. Weerdesteijn and B. Holá, *Perpetrators of International Crimes: Theories, Methods, and Evidence* (Oxford University Press, 2019) at 276.

[72] J. Subotić, 'The Cruelty of False Remorse: Biljana Plavšić at The Hague' (2012) *Southeastern Europe* 36(1): 39–59.

returned to these ethnically cleansed areas to be received as war heroes with their purposes achieved – he argued "it is counter-logic".[73] For him, the unconditional nature of their release, which meant that they were received by well-organised political supporters, ran counter to the message of the global no impunity norm. Yes, they had been held accountable, but less than initially declared, and now they flaunted this at their homecoming after UER. Thus, the norm projection had been negated, for other leaders (noted above) and simultaneously for their supporters, this counter-logic being projected to the people in the region who were an important audience for the ICTY, and particularly so in the context of being a post-conflict, ethnically divided state. The expressive act of granting UER had ramifications for society at large, discussed Section 7.5.

The other audience who receive the norm projection of punishment and its premature ending is the "average citizen".[74] Although moral condemnation and norm projection element of punishment is the focus of this chapter, it is important to recognise that some interviewees in BiH saw an overlap between the no impunity norm and deterrence. A number of scholars are cynical about the deterrent effect of punishment on the average citizen, but one interviewee's assertion responds to that of Drumbl, along with others,[75] that punishment for atrocity crimes cannot be sensibly justified in terms of deterrence and this finding is important to highlight. Drumbl argued that many lower-level perpetrators are not simply indoctrinated; some use the context of mass violence to participate solely for their own "gratification",[76] others perpetrate violence due to peer pressure.[77] However, this interviewee contended that this was exactly why punishing low-level perpetrators would further the no impunity norm at the lower level. It was important for the average citizen to see that despite their lower profile in the scheme of mass atrocities, these low-level perpetrators would also receive punishment. She argued that these lower-level perpetrators "knew what they were doing was wrong but, in the chaos, they thought 'anything goes' or would never be held to account".[78] For the norm of no impunity to be effective, it should address all typologies of perpetrators.[79] Interviewees in BiH did not state that UER would weaken the internalisation of norms in relation to potential murderers, nor the extent to which it would weaken the general deterrent effect in society overall. The speculative nature of measuring a non-happening was not discussed, but this interviewee did believe

[73] Interview, NGO, Banja Luka, RS, BiH, 24/11/2017.
[74] M. Drumbl, *Atrocity, Crime and Punishment* (Cambridge University Press, 2007) at 174.
[75] Smeulers and Sloane.
[76] M. Drumbl, *Atrocity, Crime and Punishment* (Cambridge University Press, 2007) at 171.
[77] A. Smeulers, 'What Transforms ordinary People into Gross Human Rights Violators?' in *Understanding Human Rights Violations – New Systematic Studies*, S. Carey and S. Poe (eds.) (Ashgate, 2004) at 239, 247 cited by M. Drumbl, *Atrocity, Crime and Punishment* (Cambridge University Press, 2007) at 172.
[78] Interview, NGO, Tuzla, Federation, BiH, 15/12/1207.
[79] For the different typologies of perpetrators see Chapter 5.4.2 and Chapter 6.6.1.

that general deterrence in punishing, including the average person, was important, and this thesis, therefore, reports this finding.

"Lawmakers"[80] in national jurisdictions were a target audience of expressivism, according to Amann. In BiH, no interviewees specifically referenced BiH judges (the deciders rather than makers of ICL) at the national level, as an audience. However, analysis of the 12 interviews with BiH judges indicates that they were a recipient audience in relation to the expressive element of punishment inherent in the Tribunal's practices of sentencing and UER. This finding came across as the judges interviewed expressed significantly different attitudes towards UER to all other interviewees in BiH – prosecutors, defence lawyers, IGOs, NGOs and VAs. These judges' attitudes towards UER reflected the capacity of audiences sometimes to internalise practices uncritically. The capacity was indicated in several judges' responses of both the purpose of punishment and their views in relation to UER. One judge spoke to his perception of the ICTY's value in punishing atrocity crime. For him, the value of International Criminal Justice, adjudicated by the ICTY and subsequently in BiH was as the norm projector of no impunity:

> international tribunals such as The Hague I observe them primarily as courts that are making some foundations for standards … to say that war crimes and crimes and against humanity and violation of international humanitarian law will not be allowed … people [are] aware that it will be adjudicated, that these crimes will gain world attention.[81]

The interviewee's reference to the Tribunal, establishing "foundations for standards", suggests that the Tribunal has been successful in developing ICL, which it lists as one of its major achievements.[82] The development of ICL is valuable, however, the extent to which this should be a priority of the ICTY is disputable. As noted in Chapter 4, s.4.2.3, some observers of the Tribunal critiqued this apparent judicial focus on the development of ICL as they argued that this focus led them to neglect the context on the ground. However, this thesis' interview analysis indicates, at least for the Tribunal judges interviewed, that they were not unaware of the context on the ground – noted in the following paragraph. Although a number noted with pride the Tribunal's role in the refinement of ICL, which they had played a part in, this does not prove these observers' assertion that this judicial focus acted to the detriment of others. However, it does indicate that they were keenly aware of the

[80] D.M. Amann, 'Group Mentality, Expressivism, and Genocide' (2002) *International Criminal Law Review* 2**:** 93–143, at 124.
[81] Interview, Judge, formerly WCC, Sarajevo, BiH, 03/11/2017.
[82] Indeed, five of the eight ICTY/MICT judges asserted that the development of ICL was a major contribution of the ICTY. See also the Tribunal website "has irreversibly changed the landscape of international humanitarian law" see: https://www.icty.org/en/about [accessed 04/02/2020].

role they had in being the deciders and interpreters of law. Nevertheless, the critique of ICL being practised without active consideration of the context, was illustrated by judges in BiH, the majority of whom apparently adopted these norms unquestioningly, including the norm of UER.

In adjudicating crimes, writing judgments, determining sentences and granting UER, the Tribunal established standards, and as learners of those standards, judges in BiH were trained to apply them as they adjudicated war crimes cases at the national level. Thus, the judges in BiH were an important audience who could internalise these norms. For half (six of the 12 judges interviewed), this internalisation of norms was successful, especially those who had received training from international judges, albeit not Tribunal judges. This internalisation of judicial norms was implied by one judge who noted, "I respect judgments coming from the court, I have a great deal of trust and faith in the judgments that are made by the international courts … they are working in accordance with regulation and normative acts".[83] Two judges, both from the War Crimes Chamber, reflected this attitude when asked about their initial thoughts on UER. They responded dismissively, immediately responding that "it's not a novelty, it's not new, it's not surprising".[84] These judges appear not to have given any consideration to the legitimacy of UER. This attitude, contrasted with five of the eight judges from the Tribunal who were, in the round, uncomfortable with the practice of UER, and recognised there were challenges to its legitimacy. This finding demonstrates the capacity of audiences to internalise practices, sometimes uncritically. The judges at The Hague were uncomfortable with UER primarily due to the gravity of the crime and the Presidents' assessment of perpetrators' rehabilitation. The judges in BiH, adjudicating war crimes, however, did not appear aware of, or consider on their own initiative, the nuanced thinking of ICTY judges and many had apparently accepted UER for perpetrators of atrocity crimes due to the fact that it originated from senior and respected international judges.

7.4.5. UER as a Relativisation of Atrocity Crimes

The perceived illegitimacy of UER, for the majority of interviewees in BiH, was due to the gravity of the crime, [85] aggravated by the typology of the perpetrators, their lack of remorse, all compounded by its unconditional nature. The first three factors (gravity, typology and lack of remorse) speak to the specific nature of atrocity crimes. The vast majority of interviews (with the exception of judges,

[83] Interview, Judge, Sarajevo, BiH, 12/12/2017.
[84] Interview, Judge, WCC, Sarajevo, BiH, 20/12/2017.
[85] 17 of the 57 interviewees raised the gravity of the crimes committed, the mass number of victims, the ethnic hatred motivation, and/or the cruelty of the crimes.

one NGO representative and one survivor) perceived UER as both unexpected and inappropriate for extra-ordinary crimes.[86] A number used words such as "surprised",[87] "shocked"[88] in addition to "disappointed"[89] and "devastated"[90]. This included practising lawyers, including defence lawyers. Approximately one-third of the interviewees raised the issue of proportionality in the ICTY's early termination of punishment of atrocity crimes. UER was perceived as a derision of the proportionality element of retribution, including the moral condemnation of the crime. One interviewee said she, like the victims, had a sense that the Tribunal had failed to live up to its word: "if you get five years - be there in prison for five years".[91] This assertion was for all types of perpetrators, implied as the interviewee then compared this sentence of five years to the most recent judgment at that time, Karadzic's 40 year sentence. She urged that this sentence be upheld[92] and served in full. She stated: "Karadzic, the verdict ... The Tribunal gave him 40 years, [they] need to respect that".[93] Her reference to respecting the verdict suggests that this interviewee perceived UER as disregarding the Tribunal's judgment itself. Her statement reflects that of Choi's who directed this as a criticism of the Tribunal's Presidents (as the ultimate decider of UER). Choi suggested UER was a derision of the original verdict and the sentence that accompanied it: "if the President's assessment of just deserts differs from that of the trial and appeals chambers, it is difficult to argue that her judgment should substitute for theirs".[94]

The opinion that UER dishonoured the Tribunal's purposive legitimacy, perceived as the authoritative condemnation of the perpetrators who violated the "fundamental dignity and worth of the human person",[95] was expressed by one BiH lawyer. She said her immediate thought on hearing of early release was quite simply that "it doesn't serve justice [...] war crimes *really* deserve this punishment".[96] Her statement indicates that she perceived justice as being served through the enforcement of the declared sentence; now enforcement of this sentence was terminated prematurely and the service of justice was unfulfilled. This was inappropriate given the gravity of

[86] One interviewee, an NGO, responded in a similar vein to judges that he was not surprised as it was a practice that happened in every country. Later, however he expressed his anger that the practice was unconditional.
[87] Interview, NGO, Banja Luka, RS, BiH, 24/11/2017.
[88] Interview, NGO, Sarajevo, BiH, 27/10/2017.
[89] Interview, NGO Director, Sarajevo, BiH, 07/11/2017.
[90] Interview, NGO Director, Sarajevo, BiH, midday 06/11/2017.
[91] Interview, NGO, Sarajevo, BiH, 27/10/2017.
[92] On Appeal, which is underway.
[93] Interview, NGO, Sarajevo, BiH, 27/10/2017.
[94] J. Choi, 'Early Release in International Criminal Law' (2014) *Yale Law Journal* 123: 1784-1828 at 1808.
[95] See Chapter 3, s.3.4.2. The legitimacy of the Tribunal was said to be affirmed on the *jus cogens* obligation to punish those found guilty of the most grave crimes, thus it was questionable as to what factor could effectively override this obligation by terminating prematurely that punishment.
[96] Interview, Independent Lawyer, Sarajevo, BiH, 22/12/2017. Emphasis interviewee's own.

atrocity crimes – "war crimes *really* deserve punishment". This opinion was expressed more bluntly by one NGO Director who believed that in UER "we totally lose the sense for justice … this is not a traffic incident … we are talking about crimes against humanity … grave breaches of international law"[97]. He, too, believed that early release "served no purpose" and, worse still, in relation to proportionality, that UER led to a "total relativism of the crime". For him, the gravity of the crimes deserved "hard punishment".[98] Not detailing what "hard punishment" actually encompassed, he implied that at the very least their punishment should be served in full.

The typology of perpetrators granted UER was also perceived as a significant factor in the gravity of the crime, and the interviewee also expressed a sense of anger on this basis. He cited the case of Plavšić as being the leading example of the unacceptability of the practice. This was due to the nature of her crimes (crimes against humanity and ethnic cleansing), she being an instigator in ethnic cleansing and her retraction of remorse – her retraction of the acceptance of moral condemnation. The UER of Plavšić was raised, without prompting, in 24 of the 51 interviews in BiH. Her UER was recalled, either as the interviewees' first recollection of hearing about UER or being the "best evidence against early release".[99] The dominance of Plavšić's UER illustrates the significance of the moral condemnation and norm projection element of punishment for atrocity crimes. It is asserted here that Plavšić's UER was widely cited as she was the most high-level political perpetrator who, at trial, accepted the moral condemnation of the judges as they passed the sentence. At sentencing, her publicly televised statement of guilt indicated (for some) that the moral condemnation and norm projection value of punishment had been fulfilled. Her acceptance of moral condemnation and the norm underlying it was apparent in two sentences of her statement "our leadership, of which I was a necessary part, led an effort which victimized countless *innocent people*. Explanations of self-defence and survival offer *no justification*".[100] The norm, as Hampton asserted, the recognition of the dignity of the victims (s.7.4.2) is spoken to by Plavšić as she described the victims as "innocent people". Further, the acceptance of the wrong, rather than the acceptance of illegality, is spoken to as she recognised that her actions had "no justification". Although this statement of remorse was not accepted by all the audiences in BiH,[101] it was significant nonetheless and widely reported. The significance of remorse to international criminal justice more broadly was argued by Karstedt who

[97] Interview, NGO Director, Sarajevo, BiH, 07/11/2017.
[98] Interview, NGO Director, Sarajevo, BiH, 07/11/2017.
[99] Interview, NGO Director, Sarajevo, BiH, 07/11/2017.
[100] Plavšić's statement of guilt, available on the ICTY website and cited in J. Subotić, 'The Cruelty of False Remorse: Biljana Plavšić at The Hague'. Emphasis added.
[101] Emir Suljagić, a Srebrenica massacre survivor said, "I feel like crying. There was nothing human in her words, not a note of apology. She didn't do it for me. She did it for the Serbian cause" cited by Subotić, 'The Cruelty of False Remorse: Biljana Plavšić at The Hague' at 46.

declared that "any admission of guilt and … moral responsibility address vital exigencies of the international criminal courts and tribunals, their rationale, justification, and legitimacy".[102] Karstedt supported her assertion as she recalled that the ICTY was keen to emphasis Plavšić's statement of remorse and that many victims' organisations in BiH welcomed it. Effectively, perpetrators' remorse was perceived as enhancing the Tribunal's sociological legitimacy. Indeed, at the time, one NGO argued that Plavšić's guilty plea "opens the way to the reconciliation of individuals and ethnic groups, and to restoring the dignity of the victims".[103] There is no evidence of her guilty plea in assisting in reconciliation or as restoring the dignity of the victims, as interviews did not recall their feelings on hearing the statement. However, the fact that her case was spontaneously recalled by almost half the BiH interviewees as having a negative impact on the moral condemnation of the Tribunal's punishment implies that her statement of remorse was significant as her latter rejection was found deeply offensive, so much so that it had stayed with interviewees six years later.

When Plavšić was granted UER, she was collected by President Dodik's, a denier of the genocide in Srebrenica, private jet and received by cheering grounds in Belgrade. A crowd had been gathered for her arrival. A few days later she received a similar welcome in Banja Luka, RS, BiH. She thanked her supporters and decried the Tribunal, saying that she regretted none of her actions during the war and explained that her guilty plea was for pragmatic purposes only.[104] At a minimum, one interviewee asserted that Plavšić's UER distorted the message of moral condemnation:

> Condemnation … to say 'this is wrong … and now you are being put away because we want to send this message to everyone … like Plavšić, there are so many people who still thinks she is a hero and her early release didn't help spread that message. She was convicted, but so what … she is released … all good. So that … message got scrambled completely.[105]

The belief that early release distorted the original message of moral condemnation was reflected in the use of the word "message" having negative and tangible consequences. The NGO Director, who had asserted Plavšić's release was the "best evidence against early release", applied this to the bigger picture of UER in BiH as he reflected that UER: "it's a message - you can achieve your political

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[102] S. Karstedt, '"I would Prefer to be Famous": Comparative Perspectives on the Reentry of War Criminals Sentenced at Nuremberg and The Hague' (2018) *International Criminal Justice Review* 28(4): 372-390 at 384.
[103] Humanitarian Law Center 2002 statement cited in J. Subotić, 'The Cruelty of False Remorse' at 46
[104] Fadila Memišević, President of the Society for Threatened Peoples in BiH" on Plavšić's early release: "We were the ones who constantly expressed their dissatisfaction and protested, first because of the verdict for Biljana Plavsic, 11 years, and because she was freed from the most serious guilt, that is a crime of genocide, due to her false admission of guilt. And now it has been revealed - her admission was not honest. It is a huge dissatisfaction." reported in the local media, 27/11/2009; see: https://www.slobodnaevropa.org/a/plavsic/1857949.html.
[105] Interview, Independent with professional experience engaging with victim-witnesses in Srebrenica, Sarajevo, BiH, 21/12/2017.

aims with war … punishment [but] you will survive. Everything will be okay, and we will give you [UER] and further [you] become a hero in your country, or your national or your ethnic group or religious group".[106] As noted in Chapter 4, some scholars have detailed the "celebratory homecomings"[107] that perpetrators of atrocity crimes, especially high-level perpetrators, receive as they return to the region. They outline how perpetrators portray themselves as defenders of their communities[108] and are welcomed as such.[109]

Another interviewee, an NGO representative was deeply frustrated with UER. He too recalled Plavšić's release, although his emphasis was on the low-level perpetrators return. He was disappointed with the ICTY's apparent lack of realisation of the context of return, given the nature of atrocity crimes, which had required, at the time of commission, at the very least bystanders.[110] He argued that perpetrators were not like ordinary criminals being released, those who are "silently going home … and that they [others around him] are also ashamed [of] 'what he was doing, but what the heck he is member of our family so yes, okay. We won't tell him 'fuck off from our lives'. That's supposed to be normal and that's not normal here ... [here] they are coming into that area, where they did the crime … to be welcomed by the folks who are living there, as a hero".[111] This interviewee was particularly angry at the Tribunal, further believing that UER was dangerous, although he did not believe an intimate war was likely, he reflected that with the "conditions that we have here in Bosnia and still in the region there is always a possibility".[112] He believed that the Tribunal should be aware of this and made the message of condemnation clear by not granting any early releases.

One interviewee, a prominent Serb human rights activist in the RS, also spoke to this specific context of return and perpetrators, and their supporters', rejection of moral condemnation: "he didn't change [and] he's coming back a hero … instead of the shame, instead of the guilt [no] … all the

[106] Interview, NGO Director, Sarajevo, BiH, 07/11/2017.
[107] J. M Trbovc, 'Homecomings From "The Hague": Media Coverage of ICTY Defendants After Trial and Punishment' (2018) *International Criminal Justice Review* 28(4): 406-442 at 408.
[108] K. Ristić, 'The Media Negotiations of War Criminals and Their Memoirs: The Emergence of the "ICTY Celebrity"' (2018) *International Criminal Justice Review*: 28(4): 391-405 – 'Image of the Offender' at 397-398.
[109] Although as noted in Chapter 4, these scholars do not make the link between early release and the perpetrators' homecomings.
[110] Noted by M. Drumbl, *Atrocity, Crime and Punishment* (Cambridge University Press, 2007): "Atrocity would not be able to reach truly epidemic levels but for the vigorous participation of the masses. For many … rank-and-file killers, participating in atrocity is not deviant behavior. Even less deviant is the complicity and acquiescence of the bystander" at 26.
[111] Interview, NGO, Sarajevo, BiH, 02/11/2017.
[112] Interview, NGO, Sarajevo, BiH, 02/11/2017.

things that these war criminals [were] fighting for … it's legitimised, privileged … as their … war glory effort". Indeed, this has been detailed in the literature documenting perpetrators' rhetoric on return. Ristić has detailed Šljivančanin's[113] self-portrayal as a defender of the nation. He does not discuss the crimes for which he was convicted but emphasises his efforts in fighting those "trying to destroy Yugoslavia".[114] Thus, Ristić noted that despite being found of atrocity crimes he is regularly invited to TV interviews and is reported with "a sense of intimacy" in the media and is spoken of as a "proud, heroic and truthful individual".[115]

The lawyer cited above proffered an explanation for the continued UER practice. He argued that:

> The Hague Tribunal … everything looks according to the Statute, according to the rules … international standards … everything is very neat there. When it comes here - it faces what? It faces that all the heritage, all the consequences … the international community misunderstands that … they don't think about the wider political context.[116]

His explanation that judges focused on following the black letter law[117] without considering the societal context echoed critiques of Tribunal judges made by observers. These observers criticised judges on the grounds that their focus solely on the development of the international criminal law led to side-lining the social context of the crimes.[118] However, this research found that a number of Tribunal judges were aware of the social consequences UER had on the region but took a deliberate approach as deciders of law only.[119] These judges asserted that it was for the leaders in the region, not the Tribunal to deal with the consequences of unrepentant perpetrators who stir up antagonism on return. The Serb human rights activist, however, without prompting, provided a response to these judges, as he argued that the Tribunal should have made provisions to punish perpetrators differently – not to provide perpetrators with the opportunity to stir up antagonism in the first instance. He believed that the Tribunal should have had the foresight to do so. He asserted that they should have known from the "history [of the] Nuremberg Trials [and] the case of Albert Speer" who, after being sentenced at Nuremberg "never changed, decades later".[120] For this interviewee, the Tribunal should never have allowed them to return to the region. He believed that for people like Plavšić and Krajišnik the Tribunal should impose "more political consequences", and for their

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[113] V. Šljivančanin, was convicted of torture as a war crime based on his failure as a commander, a Major in the Yugoslav Army to fulfil prevent and intervene in mistreatment of prisoners of war, see Case Information Sheet for a brief overview: https://www.icty.org/x/cases/mrksic/cis/en/cis_mrksic_al_en.pdf

[114] K. Ristić, 'The Media Negotiations of War Criminals and Their Memoirs: The Emergence of the "ICTY Celebrity"' at 397.

[115] K. Ristić, 'The Media Negotiations of War Criminals and Their Memoirs: The Emergence of the "ICTY Celebrity"' at 400.

[116] Interview, NGO, Banja Luka, RS, BiH, 24/11/2017.

[117] Chapter 5 argued that the President in fact misapplied the law.

[118] R. Hodžić, in particular (see Chapter 4, s.4.3) and this thesis' findings show that some judges disregarded the social context; see Chapter 6, s.6.4.2.

[119] See Chapter 8, s.8.5.

[120] Interview, NGO, Banja Luka, RS, BiH, 24/11/2017.

sentence to include that they "never to return to the country". For him, "ostracism is a really proper … measure for these people put in a modern, contemporary context".[121] This was a stricter condition than most interviewees suggested, but he was clear to point out it was not for "retaliation" but also for the wider and, indeed, future audience, as it "is giving a message to everybody else in the future – 'if you exit the jail you will not return to any way of normal life of an ordinary citizen that you had'".[122] It was a fitting punishment rather than a retaliatory one. Although ostracism may sound extreme,[123] it is not arbitrary, and in effect a practice under national law perpetrators who are judged to remain dangerous beyond their imprisonment. For example, an IGO policy officer interviewee had applied this to lower-level perpetrators returning to smaller communities. All interviewees were asked what they would suggest to the Tribunal for conditions on early release, and she recommended "relocation" because of the "hurt" caused by perpetrators' return … because that same person … is reinstate[d] where he or she committed war crimes".[124] Her comment reflects the example of the NGO describing the return of lower-level perpetrators. She, along with other interviewees cited above, noted the Tribunal was too remote from the region and should have some consideration for the context and not simply the black letter law of the Statute, as return had a tangible impact not on perpetrators but victims and the community as a whole.

In addition to UER being perceived of as a relativisation of the crime, many of these interviewees spoke of other "messages" which had been received by the multiple audiences in BiH itself.

7.5. UER's Unintended Messages

The opinion of UER relativising the crime and being a symbolic negation of the Tribunal's moral condemnation and norm projection embodied in the sentence, is directly linked to symbolism of punishment itself. However, in the case of UER, there were other messages received, given the specific context, connected to the gravity of atrocity crimes, but more specifically connected to the nature of criminals who commit them. As noted by Sunstein, "actions are expressive, they carry meaning",[125] and in relation to laws and legal institutions, all institutions have the potential to send

[121] Interview, NGO, Banja Luka, RS, BiH, 24/11/2017.
[122] Interview, NGO, Banja Luka, RS, BiH, 24/11/2017.
[123] Under UNDHR there is a prohibition on "arbitrary arrest, detention or exile" Article 9; and under the ECHR there is a prohibition on the imposition of "a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed" Article 7.
[124] Interview, IGO, Sarajevo, BiH, 21/12/2017.
[125] C. R. Sunstein, 'On the Expressive Function of Law' (1996) *University of Pennsylvania Law Review* 144(5) cited in D.M. Amann, 'Group Mentality, Expressivism, and Genocide' (2002) *International Criminal Law Review* 2: 118.

messages, intentional or not, and that "sometimes our audiences misinterpret what we are doing".[126] These misinterpretations are noted in Sections 7.5.2 and 7.5.3.

In the context of return to a post-conflict society, perpetrators of atrocity crimes differ from ordinary criminals as they are not necessarily considered deviant.[127] An ethnically divided post-conflict country is divided into different communities who view the conflict differently, as noted by one BiH prosecutor, "when we speak about the attitude … all three sides unfortunately; the attitude toward the war crimes is not the same".[128] Therefore, perpetrators can return as a hero in the eyes of one community, but be considered a "monster"[129] in the eyes of other communities. This can be the case anywhere, but is particularly the case in post-conflict BiH which is dominated by ethnic divides.[130] This is emphasised throughout the literature on the Tribunal's relationship with its regional stakeholders. In terms of stakeholders' perceptions, this is discussed in relation to different groups viewing the Tribunal based on "ethnic-political allegiances rather than the legality of their judgments".[131] In addition to its stakeholders' perceptions of the Tribunal, that BiH is a deeply-divided society is widely written as fact in the literature on BiH. For example, in relation to Plavšić's early release and mixed reactions, Subotić noted that this was not surprising, given "the still profound ethnic divisions that run through post-war Bosnia-Herzegovina".[132] Subotić's statement resonated throughout the fieldwork,[133] and is important to highlight here as it testifies to the importance of recognising multiple audiences and stakeholders of an institution. In over half of the 51 interviews in BiH, it was emphasised that BiH was divided and that there was no reconciliation amongst the three main ethnic groups. On one occasion, this was made explicitly clear at the outset of the interview. The interviewee began his introductions by asking the interpreter to point out the following: "he hopes that you were aware before you came here of the deep national divisions that exist in the country" which he believed were not only current but eternal, as he concluded, "we

[126] T. Meijers and M. Glasius, 'Trials as Messages of Justice: What should be expected of International Criminal Courts' at 432.
[127] See Chapter 4, s.4.5.4 and Chapter 6, s.6.6. For literature on the specificities of return in BiH, see December 2018: 'Special Issue: ICTY Celebrities: War Criminals Coming Home' (2018) *International Criminal Justice Review:* 28(4).
[128] Interview, Prosecutor, Brčko, BiH, 13/11/2017.
[129] As one interviewee described Plavšić in her recollection of her return. Interview, Independent Investigative Journalist, Sarajevo, BiH, 22/12/2017.
[130] F. Beiber, *Post-War Bosnia: Ethnicity, Inequality and Public Sector Governance* (UNRISD and Palgrave Macmillan, 2006); J. Subotić, 'The Cruelty of False Remorse: Biljana Plavšić at The Hague' and D. Orentlicher, *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia* (Oxford University Press, 2018).
[131] R. Kerr, 'Peace through Justice: The International Criminal Tribunal for the Former Yugoslavia' (2007) *Southeast European and Black Sea Studies* 7(3): 373-385 at 376. See details in Chapter 4, s.4.3.2.
[132] J. Subotić, 'The Cruelty of False Remorse: Biljana Plavšić at The Hague' at 40.
[133] The divisions were also physically apparent over the course of three months living in Sarajevo and travelling throughout in BiH: street signs in the RS in Cyrillic only, the disjointed bus system between the Federation and the RS, and through conversations with a few 'everyday' people (those not working on post-conflict justice).

won't have reconciliation nor trust".[134] Certain cities and towns are considered segregated.[135] The major national media outlets generally have a political affiliation, and their coverage of the ICTY's work was aligned with these affiliations,[136] with a limited number of exceptions. As noted by Trbovc "ethnic divisions within the media sphere determine the way local media cover such stories".[137] This was spoken to directly by a BiH judge who pointed out that, "you always have [to] question which media house belongs to which political party and then how you are going to give certain context to certain war criminals"[138] which, in turn, is how individuals as members of groups, if so aligned, receive the message, albeit unintentional, of UER. This interviewee made explicit the above noted assertion that different audiences receive the judgment and the UERs through lenses which the media outlet colours. Certainly, it was apparent over the course of the interviews that different communities heard and believed different messages as they witnessed UER. As perpetrators are granted early release often with no accompanying official explanation, such as a press release, it was left open for individuals in the divided society to interpret the motive and meaning behind the practice. These actions projected messages, and people, each with their different lenses, view UER through the different filters of the respective media outlets.[139] Thus, in a country where "politics is everything",[140] these communities and the individuals received different messages as they witnessed UER.

7.5.1. UER Rewarding Perpetrators

The least harmful message that was received was that UER was an inexplicable and inappropriate reward to the perpetrator for behaving well in prison. UER was another privilege that the perpetrator received as a result of being prosecuted in The Hague. It was a continuation of the messages already projected through the television coverage of Tribunal, whereby perpetrators received overly generous treatment. This treatment began at the trial, whereby the accused was

[134] Interview, Victims' Association, RS, 23/11/2017. An NGO representative also … we are still living in the politics who are not allowing us to live … to be with each other like that, we are still in those separate sides, we are not fighting, we are not in the war, we are even working with each other but we have one thing which still has influence on us, and even now when I put it like that we cannot actually know, does that have, what impact that has on the people around us.
[135] M. Palmberger, *How Generations Remember: Conflicting Histories and Shared Memories in Post-War Bosnia and Herzegovina* (Palgrave McMillan, 2016) in relation to Mostar, the Eastern side of the city being Bosniak and the Western side.
[136] S. Basic, *'Bosnian Society on a Path to Justice, Truth and Reconciliation'* in M. Fischer (ed.) *Peacebuilding and Civil Society in Bosnia-Herzegovina: Ten Years after Dayton* (Berghof Research Centre for Constructive Conflict Management, 2nd edition, 2007) at 371.
[137] J. M Trbovc, 'Homecomings From "The Hague": Media Coverage of ICTY Defendants After Trial and Punishment' at 409.
[138] Interview, Threes Judge in one interview, Brčko, BiH, 13/11/2017.
[139] K. Ristić, 'The Media Negotiations of War Criminals and Their Memoirs: The Emergence of the "ICTY Celebrity" who focuses on "the different ways the war criminals reappear in media discourses" at 395.
[140] Interview, Defence Lawyer, Sarajevo, BiH, 03/11/2017.

addressed as "Sir or Mister". This was noted by one judge with a clear sense of irritation, as she then asserted that the "judge is not obliged to address them with this respected title … the moment when indictment gains legal power [they are] only [an] accused person and nothing more than that".[141] In addition to expressing frustration as to how the individuals were addressed at the Tribunal, the judge pointed to their physical treatment in detention as they were housed in the Scheveningen Detention Unit (DU) and had enjoyed all the "privileges"[142] of a European justice system. The perpetrators' physical situation in the DU (access to television, internet and family visits) sharply contrasted to their victims, who had received very little or nothing from the state. This sense of perpetrators being treated with inappropriate benevolence was articulated by an Embassy official who requested anonymity. She noted that victims' communities viewed the coverage of the perpetrators' treatment in The Hague within the surroundings of relative impoverishment in BiH. In her work with victims she had been told "'look at them [perpetrators] washed and fed, they are given everything they need and then they are being granted early release. And we are still living our punishment.'" [143]

UER being perceived as yet another unwarranted privilege being accorded to perpetrators, this was sometimes linked to this being a "reward … for their good behaviour".[144] Eight interviewees used the word "reward" in relation to their perceptions of UER.[145] One prosecutor in the Republika Srpska (RS) had gone back to his law books before our interview, to find parole's purposes in national jurisdictions. When asked about the four factors[146] that the President considered in the application for early release, he reflected that he did not believe they were easy to prioritise. From his reading, he "perceived [parole] like some kind of reward for good behaviour of the prisoners [not] as a means for rehabilitation". For him "it is the tool that could be used to get prisoners' obedience and to keep them obedient … if they behave accordingly the parole could be the reward they could get".[147] This apparent objective understanding (objective to the extent the Prosecutor had looked at the purposes of parole in legal textbooks) was focused on by one interviewee who had worked in prisons

[141] Interview, Judge, Federation, BiH, 21/11/2017.
[142] The words 'privileges' or 'benefit' were noted by four interviews who were frustrated with the apparent generosity of the ICTY detention facilities.
[143] Interview, Embassy Official, Sarajevo, BiH, 13/12/2017.
[144] Interview, Defence Lawyer, Sarajevo, BiH, 03/11/2017.
[145] Interview, NGO Representative, 14/12/2017; Interview, Judge, Federation, 21/11/2017; Interview, Defence Lawyer, Sarajevo, 03/11/2017; Interview, Prosecutor, Federation, 09/11/2017; Interview, Prosecutor, RS, 22/11/2017; Interview, Prosecutor, Federation, 08/12/2017; Interview, Prosecutor, Federation, 21/11/2017; and Interview, Chief Prosecutor Brčko, 13/11/2017.
[146] Under Article 125 of the RPE – gravity of the crime, similarly-situated prisoners, substantial cooperation with the Prosecutor and evidence of a demonstration of rehabilitation.
[147] Interview, Prosecutor, RS, BiH, 22/11/2017.

at the national level in the EU. It could be argued that she too considered early release from a professional position. She asserted that early release was a means to "manage the prisoners".[148] The prosecutor believed that the practice of early release at "the international level is very similar to the ... system here".[149] Although he raised this in the context of rehabilitation, his words reflect how early release was perceived as simply a reward for good behaviour[150] and maintaining good behaviour in prisons. The diplomat who had spoken of how the victims and survivors perceive, and are frustrated by, the early release practice as yet another reward to perpetrators was a sentiment shared by professionals also.

7.5.2. UER Correcting Errors

From the other side, that of the perpetrators' communities, early release can be interpreted differently, as noted by Meijers and Glasius.[151] This point came across when meeting with individuals in the RS. The only openly pro-Milosevic Serb interviewed acknowledged that his perspective on early release very much depended on who had been freed from prison. For him, early release was not a reward, deserved or undeserved, rather it was an affirmation that "the Tribunal has corrected the errors that they made throughout the proceedings".[152] This sentence makes clear what he emphasised throughout the interview; that he did not perceive the ICTY as a legitimate institution. From his perspective, the ICTY was biased - anti-Serbian and NATO dominated. Another interviewee commented on having seen this same opinion, of the Tribunal as anti-Serb, being expressed by the President of Serbia, as he had stated on television that the "Hague Tribunal is a court that is just adjudicating Serbs".[153] The pro-Milosevic interviewee argued that the ICTY was "a revenge … not … a trial, there was selection if you look at the persons". He correctly noted that the majority of those convicted were Serbs.[154] The sentiment of revenge was articulated by him as he questioned, rhetorically, "how many were imprisoned for life do you know, except Serbs?"[155] The interviewee appeared to be emphasising the fact that of the 90 individuals convicted, the six who received life imprisonment were Serbs – there was no Albanian, Bosniak or Croat who had received this

[148] Interview, ICTY Staff Member, Sarajevo, BiH, 08/11/2017.
[149] Interview, Prosecutor, RS, BiH, 22/11/2017.
[150] See Chapter 6, s.6.6.1.
[151] T. Meijers and M. Glasius, 'Trials as Messages of Justice: What should be expected of International Criminal Courts' at 432.
[152] Interview, Victims' Association, Banja Luka, RS, BiH, 23/11/2017.
[153] Interview, Judge, Federation, BiH, 21/11/2017.
[154] Empirical studies show that Serbs who perceive the ICTY as anti-Serb will reference the statistics of the high number of Serbs convicted; see D. Orentlicher, *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia* (Oxford University Press, 2018) at 182.
[155] Interview, Victims' Association, Banja Luka, RS, BiH, 23/11/2017.

sentence.[156] For him the Tribunal had mistreated Serbs (focusing attention on their crimes rather than the crimes of others), punished them too harshly, and was now recognising this mistake as they granted UER. This belief was summed up by another interviewee, an international from an IGO, who was overall unhappy with UER. Having worked in divided and minoritised areas such as Foča and Goražde, he believed that early release would be "'twisted" by perpetrators' communities. He said that early release would not be received as "'oh, it's great to see they showed this leniency, despite all he has done'. No, it is not perceived as [this but rather] an admission of guilt from an illegitimate court".[157] This description of the reaction of perpetrators' communities mirrored exactly by the above interviewee's belief that the biased court was attempting to make amends for its treatment of hard-done-by Serb veterans as he further noted that: "90 percent of the Serbs will never accept the trials as valid ones, they perceive it as punishment because they are not pro-western policies and NATO pact".[158] UER was for him not a measure of mercy but an illegitimate court recognising its errors. The statistic noted by the interviewee is reflected in opinion polls relating to different ethnicities' perceptions of the Tribunal.[159] Additionally, empirical studies have similarly found "some communities in … the Republika Srpska in Bosnia and Herzegovina have regarded the ICTY from the outset, as being biased".[160]

The belief that the pro-war Serb population perceived UER as a correction of the Tribunal's error was reflected by other ethnic groups in the RS. One interviewee captured this as he stated that the "perception of the local community here, [is that early release] appears as a revision of the judgment".[161] This interpretation of UER as a "revision of judgment" was described by a prosecutor elsewhere in BiH who had cautioned that where early release was not, as he said, "evaluated with criticism" (i.e. a thorough process), it ran the risk of "twisting the whole idea of justice as well as the sentence and the verdict given by the court".[162] The use of the word "verdict" suggests that UER could be perceived as a distortion of the verdict, the overall finding of guilt. This speaks to the warning given by Damaška who asserted that "it is communities sympathetic to the defendant that … should be the target of moral messages. And unless the carriers of these messages are perceived

[156] Life sentences were handed down to Milan Lukić, Tolimir, Galić, Beara, Popović and Mladić.
[157] Interview, IGO, Sarajevo, BiH, 21/12/2017.
[158] Interview Victims' Association, Banja Luka, RS, BiH, 23/11/2017.
[159] For a detailed description of opinion polls, undertaken by the Belgrade Centre for Human Rights, sponsored by the OSCE (BiH polls - 2010 and 2012) see M. Milanović The *Impact of the ICTY on the Former Yugoslavia: An Anticipatory Postmortem*' (2016) *American Journal of International Law* 110(2): 233- 259.
[160] J. Mertus 'Findings from Focus Group Research on Public Perceptions of the ICTY' *Sudosteuropa*, 55(1): 107-117 cited in M. Fischer, 'Dealing with past violence as a long-term challenge' in M. Fischer and O. Simić (eds.) *Transitional Justice and Reconciliation: Lessons from the Balkans* (Routledge, 2016) at 247.
[161] Interview, Victims Association and detention camp survivor, RS, BiH, 22/11/2017.
[162] Interview, Prosecutor, Federation, BiH, 21/11/2017.

as being fair to the defendant, messages are likely to fall on deaf ears".[163] Yet, the message of early release did not fall on deaf ears.

This perceived message of the Tribunal correcting its errors had further ramifications in the post-conflict community. UER was perceived not only as a correction of an overly harsh sentence but at best a diminution of the severity of the crimes or, indeed, an overturning of guilt for that particular individual. The perception of UER as an overturning of guilt for that specific individual, in that particular case, had the capacity when manipulated by politicians such as Dodik, to distort the bigger picture of the crimes.

7.5.3. UER Fuelling Denialism

The wider ripples of UER were felt by all communities.[164] This was articulated best by one interviewee who queried whether UER ran counter to the ICTY's purpose of contributing to peace.[165] He was against early release altogether and asserted that judges considering it should reflect on the extent to which their "decision is influencing society – is it really concentrating on peace and reconciliation or actually putting fuel on the fire?"[166] For him UER had an impact on the immediate ethnic divisions in the context of revisionism. Eight of the interviewees in BiH spoke of high levels of denialism of the war atrocities.[167] Two interviewees suggested that this denialism was directly linked to the UER of high-level perpetrators, compounded by their rhetoric and their reception upon release. One interviewee asserted that UER early release "serves as a confirmation of their claims of not being guilty".[168] This Sarajevo-based interviewee believed that many perpetrators and *their communities* still denied the crimes for which they had been convicted. This belief was affirmed by interviewees in the RS, both Bosniak and Serbian. The first was a Bosniak camp survivor, as she reflected that "the ambience here is quite different, the denial is supported by the political and intellectual elite, there are very few people who are willing to openly acknowledge the crimes

[163] M. Damaška, 'The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals' (2011) *Chicago Kent International and Commercial Law Review* 38: 365 at 379.
[164] As noted by one NGO Director as he argued UER "is not a good message for direct victims and second and third generation of victims. That's very dangerous, very dangerous for the peace process, and generally for this country", Interview, NGO Director, Sarajevo, BiH, 07/11/2017.
[165] UNSCR 808, 23 February 1993, "restoration and maintenance of peace".
[166] Interview, IGO Senior Staff Member, Sarajevo, BiH, 01/12/2017.
[167] Interview, NGO Director, Sarajevo, BiH, morning 06/11/2017 described the denialism as 'a constant revision of the past'.
[168] Interview, NGO Director, Sarajevo, BiH, afternoon 06/11/2017.

committed, a few of them openly speak about atrocities, these are brave people".[169] Another interviewee, a prominent Bosnian Serb human rights activist was one of those few people.[170] He spoke at length about the current state of denialism, especially under the RS Premiership of Dodik (first elected 2006) who, as noted above, had sent Plavšić his private jet to bring her to Belgrade, Serbia upon her UER. The NGO director cited above spoke of denialism not only in BiH but throughout the region, as she continued that "things that have been established as facts by the ICTY are still a matter of dispute in this region … after [UER] they come back to the communities and they are in a position where they are denying all of the things that have happened during the conflict".[171] The impact of UER had ripples not only in the local communities, at the national level but also at the broader regional level.

The ongoing denialism of atrocity crimes, the context of UER, can be illustrated by Dodik and other political elites in the denial of the genocide in Srebrenica. Similar to legitimacy, acceptance of the truth, is not a permanent state of affairs.[172] The ICTY's Final Krstić decision,[173] April 2004, confirmed the genocide in Srebrenica, as found in the judgment by the Trial Chamber in 2001. After the ICTY's Trial Chamber 2001 decision, families of the disappeared from the Srebrenica area filed applications to the Human Rights Chamber for BiH. The Chamber ordered the Government of Republika Srpska to "conduct a full, meaningful, thorough, and detailed investigation into the events".[174] After ongoing pressure from the Office of the High Representative,[175] the RS Government reluctantly[176] established a commission to investigate alleged RS state involvement in the massacre. The Commission concluded its work in June 2004 – which uncovered a number of mass graves.[177] Nevertheless, the RS official apology, pronounced by the then Prime Minister Cavić, avoided the term genocide.[178] Instead, he stated that the "Bosnian Serb Government shares the pain of the families of Srebrenica,

[169] Interview, Victims Association and detention camp survivor, 22/11/2017.
[170] He was the interviewee who advocated for ostracism, NGO, Banja Luka, 24/11/2017.
[171] Interview, NGO Director, Sarajevo, BiH, afternoon 06/11/2017.
[172] See Chapter 3, s.3.2, Popovski and Turner argue that legitimacy is "fluid", see V. Popovski and N. Turner, 'Legality and Legitimacy in International Order' (2008) *United Nations University Policy Brief* 5(1).
[173] Radislav Krstić, Chief of Staff/Deputy Commander of the Drina Corps of the Bosnian Serb Army (VRS) was found guilty of, on the basis of individual criminal responsibility (Article 7(1) of the Statute), *inter alia,* aiding and abetting genocide. The Appeal Chamber overturned his original genocide conviction.
[174] Human Rights Chamber for BiH 2003, §212.
[175] The High Representative is an EU appointed Officer who oversees the implementation of the 1995 Dayton Agreement, see: http://www.ohr.int/?page_id=1161
[176] The Commission was established almost two years after the Chamber decision.
[177] J. Trbovc, 'On the Capacity of the ICTY to Shape Public Perception of the Bosnian War: Narratives of Genocide inside and Outside of the Courtroom'; Paper presented at the CEEISA-ISA 2016 Joint International Conference Faculty of Social Sciences, University of Ljubljana, 23-25 June 2016, see: http://web.isanet.org/Web/Conferences/CEEISA-ISA-LBJ2016/Archive/92e2778c-77f1-46a5-951d-ebd41eed8f15.pdf
[178] Also noted in D. Orentlicher, *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia* (Oxford University Press, 2018) at 302.

is truly sorry and apologises for the tragedy".[179] Six years later, RS President Dodik was quick to dismiss the "tragedy" of Srebrenica. In August 2010 the Steering Committee of the Peace Implementation Council, issued a declaration in Sarajevo which "reaffirmed that genocide in Srebrenica, war crimes and crimes against humanity committed in the course of the conflict in Bosnia-Herzegovina must not be forgotten or denied".[180] Dodik reacted strongly. He stated that the international community was attempting "to impose responsibility for the genocide – which did not happen – on an entire nation".[181] Dodik's rhetoric was matched in August 2018 when the RS government repealed the 2004 RS Government Report on Srebrenica, despite the Commission's report coming from a final and binding decision of the Human Rights Chamber of BiH.[182] The RS Government of 2018 asserted that the 2004 Report was accepted at the time because of external pressures.[183] This explanation of a retraction of an apology, reasoning that international pressure was being exerted, is strikingly similar to Plavšić's retraction of her statement of remorse in her guilty plea. Plavšić too had argued that she had been pressured by the prosecutors to accept the guilty plea.[184] The success of this narrative, the projection of the Bosnian-Serbs being victimised by Western powers, noted in the literature on the post-conflict lack of reconciliation in BiH,[185] was illustrated by the VA/War Veterans' Association in Banja Luka as he noted the ICTY was backed by NATO powers (s.7.5.2). There has not been an UER of a perpetrator convicted of genocide at the ICTY, to date, but a number of interviewees argued to the effect that many who return "are not accepting the judgment from the Hague … their behaviour after they return to communities … they believe that they have been unfairly convicted … they are refusing to acknowledge the things they have been convicted for".[186] Denialism of the atrocity crimes continues, at the political elite level and also in the everyday.

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[179] Associated Press, 11 November 2004, cited in M. Fischer and O. Simić, *Transitional Justice and Reconciliation: Lessons from the Balkans* (Routledge, 2015) at 34.
[180] See: https://balkaninsight.com/2010/12/03/dodik-slams-international-community-for-referring-to-srebrenica-massacre-as-genocide/
[181] See: https://balkaninsight.com/2010/12/03/dodik-slams-international-community-for-referring-to-srebrenica-massacre-as-genocide/
[182] Office of the High Representative (OHR) 54th Report of the High Representative for Implementation of the Peace Agreement on BiH to the Secretary-General of the United Nations (6 November 2018), see: http://www.ohr.int/?p=100167
[183] M. Fischer and O. Simić, *Transitional Justice and Reconciliation: Lessons from the Balkans* (Routledge, 2015) and see https://balkaninsight.com/2010/07/12/bosnian-serb-leader-denies-srebrenica-was-genocide/
[184] O. Simić, '"I Would Do the Same Again": In Conversation With Biljana Plavšić' (2018) *International Criminal Justice Review* 28(4): 317-332 at 321.
[185] D. Orentlicher, *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia*, noted that the ICTY judges were "mindful of Serb narratives casting the Tribunal as anti-Serb" at 160.
[186] Interview, NGO Director, Sarajevo, BiH, afternoon 06/11/2017.

The "ambience" of denialism, spoken by one interviewee in Prijedor, is reflected in the anthropological scholarship of post-conflict BiH, in the everyday life of people.[187] A pertinent example is in Prijedor itself, now a Serb-dominated area. The Trnopolje detention camp, which held thousands of non-Serbs during the war, is not publicly acknowledged as such. Families of victims killed in the camp have not been permitted to erect a memorial either in Trnopolje or in the centre of Prijedor. Repeated efforts to erect a memorial have been frustrated by the Prijedor Municipal Assembly.[188] This micro and current state of denialism, discussed in the literature,[189] resonated in this research's findings. However, thanks to the Tribunal's verdicts, judgments and archives there is and will remain an authoritative counter narrative to this current denialism. This was explained by interviewees who asserted that despite current denialism the truth had now been established, and UER would ultimately not alter that.

7.6. What UER cannot erase: The Impact of UER on the ICTY's Overall Legitimacy

Despite the majority of BiH stakeholders interviewed, with the exception of judges, expressing, at a minimum, disappointment at the practice of UER, the majority were positive with the overall work of the Tribunal. The reasons as to why this was the case are discussed in Chapter (s.8.7). One is of particular relevance in relation to the negation of moral condemnation and norm projection at UER. The overall positive legitimacy assessment was expressed, mostly implicitly, but on one occasion explicitly. This was asserted by one interviewee on the basis that the establishment of facts, the finding of guilt, the conviction, was the most important element of the ICTY's justice. Punishment was required, but an early ending of that punishment would ultimately not have enduring consequences, whereas the finding of guilt remained forever. This was eloquently summed up by one interviewee. After speaking at length of her frustration of Plavšić's release, when asked whether the practice of UER had had an impact on her assessment of the Tribunal's overall legitimacy, she responded:

> No, I can't say that it did … ICTY did a really good job … of course it wasn't perfect, but these are like, in a bigger picture, these are like glitches … they are not small,

[187] M. Brenner, 'The Struggle of Memory. Practices of the (Non-)Construction of a Memorial at Omarska' (2011) *Südosteuropa* 59(3): 349–372.
[188] See: https://www.sarajevotimes.com/memorial-to-victims-in-prijedor-to-be-opened-in-canada/
[189] For a comprehensive oversight on the current state of contested understanding of the 1991-1995 war, see: N. Moll, 'Fragmented memories in a fragmented country: memory competition and political identity-building in today's Bosnia and Herzegovina' (2013) *Nationalities Papers* 41(6): 910-935; and H. Halilovich, and P. Phipps, 'Atentat! Contested histories at the one hundredth anniversary of the Sarajevo assassination' (2015) *Communication, Politics & Culture* 48(3): 29-40.

> but I wouldn't discount everything else … [Plavšić] they have convicted her, and that is on the books … Early release will not play a role in that narrative.[190]

That the finding of guilt has established a narrative, which has being written "on the books" is the most important element – this narrative is the "bigger picture". Her focus is on this bigger picture of trial and conviction. This statement speaks to Luban's assertion that "the curious feature about international criminal law is that the emphasis shifts from punishment to trials".[191] He asserted, on the basis of the widespread belief, that no punishment can match the gravity of these crimes. With that in mind, he argued it is the finding of guilt that holds most value rather than the punishment which follows. Although Luban discussed the importance of fair trial proceedings, the interviewee's emphasis was on the trial outcome, the conviction, as the big picture; and it is this big picture which will remain in her mind. The understanding of the lasting effects of proclaimed punishment reflects Drumbl's assertion that "prosecution and punishment can manufacture an authoritative version of the truth, and thereby narrate a story that later becomes history".[192] The truth may not be accepted by everyone, and not in the current time, but it is the written record of facts, now history, which the UER cannot erase. This long view is spoken to by Karstedt as she paralleled the release of unrepentant perpetrator Plavšić to that of Nuremberg convict Albert Speer. Karstedt concluded that in the case of Germany "the historical account is one of slowly changing collective attitudes in addressing the past … a course which returning … perpetrators obviously did not change".[193] Karstedt's and Drumbl's assertions echo the sentiment of the BiH interviewee: perpetrators can return and be welcomed now but there is an established counter record to their rhetoric and current popularity. The relativisation and denial of crimes, therefore, may not be permanent.

7.7. Desired message

As discussed in Chapter 6, remorse for the crimes and a recognition of the moral[194] rather than legal wrong of the crime speaks to the significance of the norm projection element of punishment. This norm projection of the micro, an understanding of the dignity of each individual, based on our shared humanity, regardless of race, ethnicity, religion, this thesis argues, is key. This was articulated by one interviewee who argued that punishment should express that there is "no national reason"

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[190] Interview, Independent with professional experience engaging with victim-witnesses in Srebrenica, Sarajevo, BiH, 21/12/2017.
[191] D. Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law' at 575.
[192] M. Drumbl, *Atrocity, Crime and Punishment* (Cambridge University Press, 2007) at 175.
[193] S. Karstedt, '"I would Prefer to be Famous": Comparative Perspectives on the Reentry of War Criminals Sentenced at Nuremberg and The Hague' at 384-385.
[194] See Chapter 6, s.6.7.

for crimes.[195] An internalisation of this norm would mean that individuals would have a sense of a shared humanity with all other individuals regardless of their specific religious, ethnic or political group. With this desired message in mind, caution is noted here in relation to focusing on the macro-norm, perceived by Fisher, which placed emphasis on the group desire and right of groups to socially organise. Through this right or desire, the group focus places the emphasis on groups and shared values between groups rather than shared values across *all* human beings, *qua* being human. Perpetrators convicted before the ICTY frequently had committed crimes against victims due to their membership or affiliation with an ethnic group.[196] They committed crimes on the basis of group identity, or in the context of group identity being emphasised. A Serb, a Croat, or a Bosniak perpetrator violated another individual's, or individuals', human rights (their right to life, not to be arbitrarily detained, or tortured, for example) based on the identification of that individual as a member of another group, or who has associated with that other group. If, however, a simpler, more fundamental message can be projected, that being that *all* humans are equal regardless of ethnicity, nationality etc., leaders of groups would find it more difficult to shift a mind-set towards group affiliation. A mind-set which focuses on groups' rights implies that people differ in some way, which immediately opens up the potential for division rather than universality. A mind-set which recognises the universality of each individual having equal value simply by virtue of what Duff calls our "shared humanity"[197] would be less susceptible to finding differences from a mind-set that is already focused on differences.

7.8. Conclusion

The dominant view, among inside stakeholders in The Hague and outside stakeholders in BiH, is that punishment for perpetrators of atrocity crimes is important primarily to send "messages" to people, a variety of different people, that certain acts committed are wrong, inexcusable, and fitting for punishment. These findings resonate with Feinberg's assertion of punishment's capacity to morally disavow wrongs. This dominant view that punishment projects a moral condemnation of the atrocity crimes supports scholars who have argued that the most appropriate reason for punishing atrocity crimes is "expressivism".[198] This chapter argues, based on the interview data, that a stronger emphasis should be placed on why punishment for atrocity crimes is appropriate, that is as a

[195] Interview, Prosecutor, RS, BiH, 17/11/2017.
[196] *Kunarac et al*, Trial Chamber Judgement, 22 February 2001, para. 592. See Chapter 6, s.6.6.1.
[197] A. Duff, 'Authority and Responsibility in International Criminal Law' in S. Besson and J. Tasioulas (eds.) *The Philosophy of International Law* (Oxford University Press, 2010) at 601.
[198] M. Drumbl uses this term, for the purposes of atrocity crimes and the expressive capacity is used by D.M. Amann, R. Sloane, T. Meijers & M. Glasius, D. Luban, K. Fisher, and B. Wringe.

vindication of the dignity of the victims. In punishing atrocity crimes, motivated by the hatred of the other, enabled by the belief that killing persons based on their difference (ethnic or religious background in this context), it is important to emphasise this element of the crime that is specifically been condemned. This is the norm that was, and is, projected in punishing perpetrators of atrocity crimes. It is argued here that for many in BiH itself, those who supported the ICTY's dispensation of punishment, had internalised this norm – that all humans are of equal worth regardless of ethnicity or race.

When UER is granted to unrepentant perpetrators, the moral condemnation and norm projection, symbolised in the punishment, is distorted. Thus, UER undermined the perceived purposive legitimacy[199] of the Tribunal for a number of interviewees. This was signified in the dominance of Plavšić's UER being widely referenced by interviews in BiH. Plavšić's UER, despite her acceptance of the moral condemnation handed down to her in the 11-year sentence, being retracted, was emphasised as the "best evidence against early release",[200] because her UER directly contradicted the message of the original punishment.

In BiH, UER was widely[201] perceived as relativising atrocity crimes, which should not be considered as ordinary crimes. This was based not only on the gravity of the crime but the justification for those crimes – that of the other (the victims) being of lesser value. That the majority of interviewees in BiH had internalised the norm was reflected by interviewees who perceived punishment for perpetrators as holding valuable messages for others beyond their own border. In turn, they perceived UER as harmful to this message, not only to persons in BiH but to persons outside their borders, that is, all humans intrinsically have value. In addition to this broader picture, UER sent specific and damaging, albeit unintentional, messages which were significant in the immediate context of a post-conflict, ethnically divided BiH – where others had not internalised the norm and who perceived UER as an illegitimate Tribunal correcting its errors. Nevertheless, Luban's assertion that the focal point of ICL is the trial rather than punishment is reflected in the fact that for the vast majority, UER had not undermined the overall legitimacy of the Tribunal. Perpetrators had been brought to justice and their conviction, their finding of guilt, remained.

[199] See Chapter 3, s.3.4.2.
[200] Interview, NGO Director, Sarajevo, BiH, 07/11/2017.
[201] With the notable exception of judges in BiH.

It is the victims who have suffered directly from these atrocity crimes and, in the eyes of the majority of stakeholders in BiH, suffered again as perpetrators are granted UER – therefore, it is the victims to whom we shall now turn.

Chapter 8: Victims Sense of Injustice

8.1. Introduction

This chapter builds on the previous one which sets out how an important element of the expressive purpose of punishment is conceived of (particularly amongst stakeholders in BiH) as an official recognition of the dignity of the victim. With this in mind, this chapter argues that UER is sociologically illegitimate for the majority of stakeholders in BiH (with the exception of judges) and discusses how ending this punishment early has negative implications for the victims. The chapter begins with a discussion of how the majority of stakeholders in BiH perceive perpetrators' early release as an on-going injustice to victims, whereby perpetrators are, again, being accorded favourable treatment (s.8.2). It outlines how victims were originally constructed as stakeholders at the ICTY (s.8.3), it then contrasts the rhetoric with the reality. Based on interview analysis, it explains how decision-makers perceive victims' sense of justice as these findings go some way to explain how victims were overlooked in this element of the justice system (s.8.4). The thematic analysis of these findings confirms much of the existing international criminal justice literature, which asserts that victims are frequently conceptualised as passive stakeholders by decision-makers at the Tribunal, which has created a performance legitimacy deficit, as the Tribunal overlooked a core "constituency".[1] It then contrasts these sentiments with the views expressed by others at the Tribunal and interviewees in BiH (with the notable exception of judges), who largely perceive the Tribunal as having an ongoing duty of care to victims (s.8.5), and highlights the different criteria of procedural justice which stakeholders in BiH indicated could ameliorate the sense of injustice to victims caused by UER (s.8.6). Finally, it elaborates on the context in BiH, and how this has affected perceptions of the Tribunal's overall legitimacy (s.8.7). Therefore, the chapter concludes (s.8.8) by addressing the overarching element of the research question: the extent to which the UER affected perceptions of the Tribunal's overall legitimacy, and provides an explanation of why.

8.2. Victims' Sense of Injustice Perpetuated by UER: Perpetrators' Justice Trumps Victims

UER was perceived by many interviewees, notably Victims Associations (VAs) and NGOs and those working with victims, as an on-going injustice to victims, whereby perpetrators were afforded more respect than victims by the Tribunal. Ironically, perpetrators who violate victims' human rights already benefit from the principle of lenity in criminal law as has been noted in the literature on

[1] A. Cassese, 'The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice' *Leiden Journal of International Law* (2012) 25: 491–501 at 492.

international criminal law, in particular at trial.[2] Chapters 5 and 6 illustrate that the principle of lenity went beyond the trial stage to enforcement of sentences. This view of a continuum of injustices experienced by victims in contrast to perpetrators came across in two different ways in the interviews in BiH: firstly, in a material sense, perpetrators had visibly received more resources than victims, and, secondly, in the grant of UER the Tribunal repeated the same act of unjustified leniency towards the perpetrator as they had done in sentencing. In BiH there was an overall belief that the interests of perpetrators were the sole focus at the enforcement stage of the international criminal justice, to the exclusion of victims who were nevertheless still suffering due to these atrocity crimes. Further, some war victims, especially victims of rape, were restricted or denied access to reparations due to prescriptive requirements (detailed below)[3] and for the relatives of those murdered, many are unable to bury their dead as 10,000 bodies remain disappeared.[4] This sentiment was expressed by the majority of interviewees (except for judges) in BiH, and was articulated by one judge at the Tribunal itself who believed that "we lean too much towards the accused persons and forget about the victims".[5]

The view that victims were being overlooked by the Tribunal due to a bias toward the perpetrators was illustrated by one NGO early on in the interview. After noting that the researcher had conducted 17 interviews in The Hague and was now in BiH to hear from the war-affected communities, she immediately asked for an explanation for UER, stating that her NGO had "never got a clear answer how actually this practice was developed" [6] and she wished to know the answers the researcher had obtained from the Tribunal. Her statement indicates she had either asked but not been provided with a clear answer as to why the practice was happening, or that she had simply not heard any explanation from the Tribunal. Either of these scenarios, not receiving a clear answer or not being provided with one, indicate a lack of procedural justice, whereby stakeholders were either not

[2] D. Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law' in S. Besson and J. Tasioulas (eds.) *The Philosophy of International Law* (Oxford University Press, 2009) at 582, emphasising A.M Danner and J.S. Martinez who noted that, "human rights law adopts the standpoint of protecting victims and therefore requires the law to be read broadly in cases of ambiguity but criminal law adopts the standpoint of protecting defendant and the principle of lenity requires ambiguous statutes to be read narrowly", see A.M Danner and J.S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (2005) *California Law Review* 93(1): 75 -170 at 93.

[3] Amnesty International, Bosnia and Herzegovina: Submission to the United Nations Human Rights Committee 119th Session, 13 February 2017, at 8-10, 'Access to Justice and Reparations', see: https://www.amnesty.org/en/documents/eur63/5554/2017/en/ [accessed 27/12/2019].

[4] ICMP figures, see: https://www.icmp.int/where-we-work/europe/western-balkans/bosnia-and-herzegovina/ [accessed 27/12/2019]

[5] Interview, Judge, The Hague, 03/02/2017.

[6] Interview, NGO Director, Sarajevo, BiH, afternoon 06/11/2017.

informed or not comprehensively informed of the process.[7] When she was informed that perpetrators of crimes had the right to be considered for early release from imprisonment under the European Convention of Human Rights, which all enforcement states were a party to, she responded with a rhetorical question: "are international courts being established so we can protect the rights of war criminals or are they being established in order to get justice for victims?"[8] Her rhetorical question expressed more bluntly what the Tribunal judge above had articulated, a sense of perpetrators' human rights continually trumping victims' interests.[9]

From the outset of their time at The Hague, perpetrators were afforded status along with fair trial rights, which translated into material benefits, which was picked up by the BiH media. For example, one media report noted how those indicted before the Tribunal had their defence lawyers paid for initially by the Tribunal itself.[10] Though this is a legal right, it contrasts with material deprivation still felt by victims of the conflict in BiH. Perpetrators are removed from the economically difficult reality in BiH. In general terms, BiH, in 2017, had an unemployment rate of approximately 20%.[11] The data is not disaggregated in relation to the level of unemployment amongst victims, but this is the context within which their reality is lived. Although statistics cannot be provided here, an Amnesty International report to the UN asserted that victims often had low "socio-economic status" and "subsist on the margins of society".[12] Beyond the material side, scholars have noted that the "legacies of the conflict are still very much alive [and] victims [are] still awaiting acknowledgement of their suffering or redress for their harms".[13] From 2000 onward, the ICTY trials were broadcast live across the region[14] and the media reported on their life in the UN Detention Unit (UNDU) and later the prisons in the enforcement state.[15] As Meernik and King's research found, the public in BiH were more aware of the open prison where Plavšić, convicted of crimes against humanity, was serving her

[7] Y. Huo and T. Tyler, *Trust in the Law: Encouraging Public Cooperation with the Police and the Courts* (Russell-Sage Foundation, 2002) and J. Thibaut and L. Walker, *Procedural Justice: A Psychological Analysis* (Erlbaum, 1975) cited in R. Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia' (2016) *International Criminal Law Review* 16: 1-38 at 5.
[8] Interview, NGO Director, Sarajevo, BiH, afternoon 06/11/2017.
[9] One interviewee in The Hague emphasised that victims' do not have specific rights in the ICTY Statute, in contrast to the accused and perpetrators – victims' interests are to be taken into account only (Article 22, Statute). Interview, Staff Member, The Hague, 03/02/2017.
[10] See: https://balkaninsight.com/2017/11/17/hague-tribunal-and-serbs-spend-2m-on-mladic-trial-11-15-2017/ [accessed 27/12/2019].
[11] See https://www.ceicdata.com/en/indicator/bosnia-and-herzegovina/unemployment-rate [accessed 29/01/2020].
[12] Amnesty International, Bosnia and Herzegovina: Submission to the United Nations Human Rights Committee 119th Session, 13 February 2017, at 8-10, 'Access to Justice and Reparations'.
[13] M. Fischer and O. Simić, *Transitional Justice and Reconciliation: Lessons from the Balkans* (Routledge, 2015) at 14.
[14] ICTY Annual Report 2000, para. 215. However E. Stover, *The Witnesses,* noted that the live broadcasts were not aired consistently due to funding at the Tribunal, at 114.
[15] Institute for War and Peace Reporting; see https://iwpr.net/global-voices/inside-hague-hilton [accessed 27/12/2019]

sentence and the horse-riding lessons available to her, than they were with the crimes for which she was finally sentenced.[16] These privileges experienced by the perpetrators contrasted to the position of the victims in BiH, where there was a lack of state recognition and subsequent lack of reparations for injuries inflicted in the war, murder of a family-member who contributed financially to the family, and the non-return of property.[17]

At the same time as perpetrators were benefiting from the European justice system,[18] the Republika Srpska (RS) financially supported some ICTY indictees and their families.[19] Albeit not the fault of the Tribunal, perceptions, as s.8.7.1 illustrates, are shaped by this context. There was the sense of bitter irony that perpetrators were materially better-off than victims, as they were "brought to justice"[20] for the crimes they had perpetrated (or were accused of), in contrast to the victims who were harmed directly by the atrocities. This disparity is recognised in BiH as the public, including victims, are "aware of the enormous sums spent ... on supporting defendants … in contrast, victims feel there is little money spent to support and care for victims and the victim communities".[21]

Although the injustices faced by victims in BiH are not due to the Tribunal, but the intransigence of an ethnically divided Bosnian state,[22] it is this context within which victims experience the early release of perpetrators. Perpetrators benefitting from UER, who - as one interviewee noted - had received a "hotel package"[23] in the UNDU, have now been granted freedom by an official authority, The Tribunal. In contrast, in BiH civilian victims were frequently denied victim status under the peculiarities of state laws.[24] Due to the autonomy of the state entities (the RS and the Federation),

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[16] K. King and J.D Meernik, 'Assessing the Impact of the ICTY: Balancing International with Local Interests while doing Justice' in B. Swart, A. Zahar and G. Sluiter (eds.) *The Legacy of the ICTY* (Oxford University Press, 2011) cited by R. Mulgrew *Towards the Development of an International Penal System* (Cambridge University Press, 2013) at 229.
[17] Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report – Universal Periodic Review, 2014, at 1.
[18] See Chapter 6, s.6.2 on the human rights standards applicable to perpetrators serving their sentence in European States. The European Convention on Human Rights has accorded relatively high standards of fair trial rights to the accused. During detention the European Committee Against Torture, Minimum Standards etc. are, under the ICTY's bilateral agreement with enforcement states, due to comply with the highest human rights standards.
[19] http://archive.balkaninsight.com/en/article/ethnic-politics-dictate-payments [accessed 27/12/2019].
[20] UNSCR 808 22 February 1993.
[21] E. Ramulić, 'Victims' Perspective' in R. Steinberg (ed.) *Assessing the Legacy of the ICTY* (Martinus Nijhoff Publishers, 2011) at 104.
[22] C. Grewe and M. Riegner, 'Internationalized Constitutionalism in Ethnically Divided Societies: Bosnia-Herzegovina and Kosovo Compared' in A. von Bogandy and R. Wolfrum (eds.) *Max Planck Yearbook of United Nations Law* (2011) 15, 1-64 at 31.
[23] Interview, NGO Director, Sarajevo, midday 06/11/2017 and Prosecutor, Federation, 21/11/2017. These two interviewees referred to prison conditions as 'hotel packages' and 'hotel service' respectively.
[24] Amnesty International, Bosnia and Herzegovina: Submission to the United Nations Human Rights Committee 119th Session, 13 February 2017, at 9.

access to reparations for civilian victims is lacking. Alongside this, war veterans, in contrast to civilian victims, are afforded pensions and financial compensation for injuries incurred. This is demonstrated by two laws in each entity which deal with reparations for loss incurred during the war. The Republika Srpska Law on Protection of Civilian Victims of War, 2007 did not recognise survivors of wartime sexual violence as a specific category. It also had a stringent requirement to demonstrate bodily damage of at least 60% as a direct consequence of the violation.[25] At the Federation level, applicants were originally required to apply for civilian victims-of-war status with selected civil society organisations, of which not all survivors were members or with which they wanted to be associated. In 2016, legal amendments addressed this by introducing an independent expert commission with a mandate to issue certificates, but as of February 2017 the Commission had not commenced its work.[26] There was no overarching reparations system at the state level and no overarching law on the rights of victims of torture, as of February 2017.[27] At the national level, there was a lack of recognition of victim status and victims were frequently denied economic reparations; this is contrasted with the position of war veterans (though not necessarily war criminals), who were part of the larger group who had inflicted atrocities against them. The material well-being of those convicted by the ICTY, and, in parallel, their supporters and comrades, war-veteran groups, contrasted with the majority of victims who had received no material reparation for their losses. UER was another benefit that perpetrators received while the victims received nothing.

UER was sociologically illegitimate for most interviewees in BiH,[28] primarily perceived as double injustice directly levied by The Tribunal. The initial injustice was that of a lenient sentence, now compounded by its non-completion. It was a "second slap in the face"[29] by the Tribunal. The Tribunal routinely argued that their work would bring victims a sense of satisfaction by punishing those found guilty,[30] yet that promise was dashed by what many perceived as lenient sentences, and this same injustice was being repeated as the perpetrators were now not serving the pronounced sentence. In effect, the Tribunal had failed to fulfil its retributive pledge to victims. In 2003 it had stated that victims as well as perpetrators mattered in the administration of justice: "the Tribunal is not only

[25] Law on protection of civilian victims of war of RS (*Zakon o zaštiti civilnih žrtava rata RS-a*) Official Gazette of RS, nos. 25/93, 32/94, 37/07, 60/07. See Amnesty International, Bosnia and Herzegovina: Submission to the United Nations Human Rights Committee 119th Session, 13 February 2017, at 9.
[26] Amnesty International, Bosnia and Herzegovina: Submission to the United Nations Human Rights Committee 119th Session, 13 February 2017, at 9.
[27] Law on the Basis of the Social Protection, Protection of Civilian Victims of War and Families of Children in the Federation
[28] With the expectation of BiH judges.
[29] Interview, Senior Staff Member, The Hague, 02/02/2017.
[30] See Chapter 4, s.4.3.1.

mandated to search for and record, as far as possible, the truth of what happened in the former Yugoslavia, but also *bring justice to both victims and their relatives and to perpetrators*".[31] This legitimacy deficit, through the non-fulfilment of a lenient sentence which, although it was not a reduced one, was described as such. One Victims' Association (VA) interviewee, a direct victim himself, noted that "sentences are too low to begin with [then they] are reduced by one-third. It is some sort of attack on those who were direct victims of persecution and those … who felt war crimes on their own skin".[32] This sense of an infliction of suffering by the Tribunal on top of an existing hurt caused by lenient sentences was described by another interviewee: "additional[ly] early release … is like putting salt into the wounds of the victims".[33] This same metaphor of "salt on wounds" was used by the VA, Mothers of Srebrenica, who upon Krajišnik's early release made the statement that his early release and the subsequent celebratory return was like "rubbing salt into the open wounds of the people who lost a family member".[34]

The view that there was a negligent absence of consideration for victims in the grant of UER was *prima facie* reflected in the publicly available early release decisions of the President. At the time of these the BiH interviews, only 25 of the 54 positive early release decisions[35] considered victims. Ten of these considered them in general terms, whereby perpetrators had expressed remorse for victims,[36] or under gravity of the crimes, notably when perpetrators were high level[37] or direct perpetrators.[38] Four decisions did detail the gravity of the specific crimes, notably that of sexual enslavement and rape.[39] This statistic supports interviewees' views that the focus is now on the perpetrators despite there being space to allow victims to be considered at this stage – under gravity of the crimes. As set out in Chapter 5, the first factor the President is required to consider under the Rules and Procedure of Evidence (RPE) is the "gravity of the crime". Under gravity, the impact of the crime on the victim could be considered. When victims remain unacknowledged (in the written record and in practice) by the Tribunal, as perpetrators are granted early release, it runs counter to the principles now widely accepted in the field of criminal justice, both national and international, that "what victims need is acknowledgement [and that] … to acknowledge the victimhood of others

[31] *Dragan Nikolić,* Sentencing Judgment, Case No. IT-94-2-S, 18 December 2003, para. 120. Emphasis added.
[32] Interview, NGO, Prijedor, RS, BiH, 22/11/2017.
[33] Interview, NGO Representative, Sarajevo, BiH, 14/12/2017.
[34] Hatidža Mehmedović, President of the Mothers of Srebrenica's statement to *Federalna TV*, 2013 cited in J. M. Trbovc, 'Homecomings From "The Hague": Media Coverage of ICTY Defendants After Trial and Punishment Article' (2018) *International Criminal Justice Review* 28(4): 406-42 at 416.
[35] 54 of the decisions which granted an UER.
[36] Furundžija, Ojdanić, Pandurević, Naletilić, Plavšić, Pušić, Radić, B. Simić, M. Simić and S. Zarić.
[37] Blagojević, Kordić, Momir Nikolić, Dragan Nikolić, Šljivančanin and Tarčulovski.
[38] Češić, Delić, Martinović, Mrđa, D. Tadić, Rajic, Sikirica, Vasiljević, Vuković, and Zelenović,
[39] For example, Kovač, granted unconditional early release by President Meron at 2/3 of his prison sentence.

is to express … in word or deed, awareness that he is injured, likely damaged, and *still suffering*".[40] One third of the interviews in BiH[41] expressed a sense frustration that victims were not acknowledged at this stage. As one interviewee noted, "prior to making this decision, [they should consider] what is at stake; every single principle compared to the harm that was inflicted on the communities, on individuals. Compared to their [perpetrators'] problems, all of them would be insignificant". He concluded his statement by noting that: "the question, which is completely justified, by the victims' family from their perspective … why are we not being properly assessed? Our suffering … with regards to the sentencing, to early release policies".[42]

This statement captures the two elements of the sociological legitimacy deficit of UER: first; that perpetrators' well-being is perceived as being accorded priority by The Hague, which leads to the second legitimacy deficit; victims' suffering (which is on-going and worse than that of the perpetrators) is overlooked. There is no literature to support this finding, because, to the author's knowledge, there has been no other research examining the impact of UER in the region,[43] although the value of such research has been identified by others.[44] However, as discussed below, this research has, to the extent possible, been able to find a number of reasons why victims were not considered. One of the reasons, a focus on perpetrators' human rights, is best summed up by Abels, who asserted that "the real worth of international punishment: showing the former conflict region and the convicted persons how communities that respect the rule of law treat their most unpopular and vulnerable members".[45] Abels' assertion that convicted persons are the most unpopular and vulnerable members of society is ill-conceived in the case of BiH,[46] in which, as the preceding chapter discussed, returning perpetrators are not in-the-round unpopular: many receive heroes'

[40] T. Govier, *Victims and Victimhood* (Broadview Press, 2015) at 157. Emphasis is added here in the phrase 'still suffering' as it is this aspect that the thesis has focused on, in contrast to international criminal justice scholarship which has almost exclusively examined victims in the trial process, not after its conclusion. This thesis picks up on this element, which is notably lacking in the general scholarship which has focused on victims' limited role in the trial process, rather than the post-trial stage.

[41] 16 of 51 interviews in BiH.

[42] Interview, NGO Director, Sarajevo, midday 06/11/2017.

[43] Although as noted, there has been literature which has examined the return of those indicted by the ICTY to the region but it has not examined the unconditional and early nature of the release. See: December 2018: 'Special Issue: ICTY Celebrities: War Criminals Coming Home' (2018) *International Criminal Justice Review* 28(4).

[44] B. Holá, J. van Wijk, F. Constantini, and A. Korhonnen, 'Does Remorse Count? ICTY Convicts' Reflections on Their Crimes in Early Release Decisions' (2018) *International Criminal Justice Review* 28(4): 349-371 at 366.

[45] D. Abels, 'Limiting the Objectives of the Enforcement of International Punishment' in R. Mulgrew and D. Abels (eds.) *Research Handbook on the International Penal System* (Edward Elgar, 2016) at 273.

[46] And this may be the case for other post-conflict societies where perpetrators are not necessarily unpopular in the eyes of the local populations.

welcome[47] by a number of their former comrades and on-going supporters,[48] appointed director of health centre and appointed as a chief military advisor.[49] Further, this assertion is in sharp contrast to what the ICTY promulgated as the *raison d'être* of international punishment. In addition to condemning the perpetrator and deterring others, the Tribunal has frequently cited bringing justice to victims through the punishment of the perpetrators, and this rhetoric had resonated with many in BiH – almost one third, 14 of the 51 interviews[50] in BiH perceived punishment at the Tribunal as primarily a means of victims' satisfaction.[51] Fundamentally, victims' expectations were raised, and then disappointed,[52] to which we now turn.

8.3. Victims as Stakeholders in the ICTY's Administration of Justice

The concept of victims as rightful but dispossessed stakeholders[53] in the criminal justice system, Christie's "conflicts as property"[54] argument – whereby lawyers capture and overtake the rightful place of the victim, was reflected in interviews in The Hague. The interview analysis supports Christie's assertion of victims as simply the "trigger-offerer".[55] Additionally, it supports more recent scholarship which has asserted that at the ICTY victims were perceived and treated as passive stakeholders.[56] At the practical level, the interviewee feedback found that there was no policy of communicating the practice, either from a passive or more pro-active approach. The minimum

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[47] December 2018: 'Special Issue: ICTY Celebrities: War Criminals Coming Home' (2018) *International Criminal Justice Review* 28(4). See Chapter 4, s.4.5.4.

[48] N. Zupan, 'Facing the Past and Transitional Justice in Countries of Former Yugoslavia' 327-342 in M. Fischer (ed.) *Peacebuilding and Civil Society in Bosnia and Herzegovina: Ten Years After Dayton* (Berghof Research Centre for Constructive Conflict Management, 2nd edition, 2007) at 337, "very often perpetrators are celebrated as "heroes" in their communities. This is not only a hurt to survivors of human rights violations, but also affects how collective historical memories of wartime are developed".

[49] 'Only in Serbia: Convicted War Criminal To Train Young Officers', see: https://www.rferl.org/a/serbia-convicted-war-criminal-to-train-young-officers-hague/28825964.html [accessed 27/12/2019].

[50] One of the interview questions was what interviewees perceived the purpose of punishment at the Tribunal as being; 14 to 51 of these began their response in relation to justice for the victims.

[51] Consequently, when the punishment was terminated early with no explanation provided, it led to a sense of victims' injustice.

[52] Empirical research on ICTs and the ICC in particular has found that the international tribunals frequently raised victims' expectations unrealistically, often through rhetoric, which has led to disappointment. See: T. Obel Hansen and C. Lekha Sriram 'Fighting for Justice (and Survival): Kenyan Civil Society Accountability Strategies and Their Enemies' (2015) *International Journal of Transitional Justice* 9: 407–427 at 416. This was forewarned in the literature, for example – "allowing victims to participate and then disrespecting them or flagrantly failing to meet their expectations will lead to secondary victimisation" argued by R. Letschert, 'International Criminal Proceedings—An Adequate Tool for Victims' Justice?' in K. Tibori-Szabó and M. Hirst (eds.) *Victim Participation in International Criminal Justice Practitioners' Guide* (Asser Press, 2015) at 468, who references generally U. Orth, 'Secondary Victimisation of Crime Victims by Criminal Proceedings' (2002) *Social Justice Research* 15(4): 313-325.

[53] Noted in relation to international criminal justice by L. May and S. Fyfe, "Athena's trial stands completely outside of the charges and counter charges of the people who have been affected, namely the victims. … Athena pushes the proceedings forward by focusing on the question of Orestes' guilt" - see L. May and S. Fyfe, *International Criminal Tribunals: A Normative Defense* (Cambridge University Press, 2017) at 27.

[54] See Chapter 3, s.3.6 - N. Christie, 'Conflicts as Property' (1977) *The British Journal of Criminology* 17(1).

[55] N. Christie, 'Conflicts as Property' at 3.

[56] See Chapter 4, s.4.3.1.

(passive) approach was not taken. Direct victims were not, as a routine practice, informed of the UER of perpetrators prior to or after the release, despite there being a provision in the Practice Direction for the President to inform "other relevant parties".[57] Informing relevant parties, was a minimal step, flagged up to the President on reading the Practice Direction. This communication would have met an element of the standard of good procedural justice, whereby stakeholders are kept informed of their case.[58]

Indirect victims, and the general public were also not routinely informed. On a number of occasions, Annual Reports did note that an early release had been granted, but not consistently. Neither was an active approach taken, encompassing an explanation as to why the practice occurred in the legal sense (as noted by the NGO Director in s.8.2). No reasons or justification was provided for the practice of UER.[59]

This is not to say that the Tribunal was disingenuous or that they did not care about victims. A number of judges spoke of how they had advocated for reparations and that they wanted to hear from victims - for the sake of victims. This active approach to understanding the harm caused to victims, and to encompass this into an appropriate punishment - thereby providing victims with a sense of satisfaction, was indicated by one example provided by a Tribunal judge. When asked about a role for victims, he noted that there was some victim participation at the Tribunal, although it was "not in the way conceived by the ICC"; the Tribunal "had made in-roads".[60] He pointed out that space had been made for victims to come and testify when the accused had pled guilty. He said that when he started work at the Tribunal there was just a "sentencing hearing lasting a few hours and then a sentence". For him, he said, this was "unacceptable" because "there were hundreds of victims whose hope was to be able to come here so someone will hear their story; and all of a sudden they find this person is going to deny them that by pleading guilty and as a recompense he's

[57] Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the International Tribunal, April 1999. See Chapter 5, s.5.3.
[58] J.A. Wemmers, 'Victim Notification and Public Support for the Criminal Justice System' (1999) *International Review of Victimology* 6(3): 167-178 and Y. Huo and T. Tyler, *Trust in the Law: Encouraging Public Cooperation with the Police and the Courts* (Russell-Sage Foundation, 2002) and J. Thibaut and L. Walker, *Procedural Justice: A Psychological Analysis* (Erlbaum, 1975) cited in R. Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia' (2016) *International Criminal Law Review* 16: 1-38 at 5. See further Chapter 3, s.3.6.3.
[59] As was noted by the NGO Director; Interview, NGO, Sarajevo, BiH, afternoon 06/11/2017.
[60] Interview, Judge, The Hague, morning of 30/01/2017.

even going to get a lighter sentence".[61] The first section of his example speaks to the sense of care he had to victims; he took an active step to provide them with the opportunity to speak, which he believed they wanted. This sense of duty was indicated by another judge, formerly at The Tribunal (also asked about the role of victims); although he did not provide any examples, he noted that "Article 20 gives the victims' rights. It provides for full respect of the rights of the accused but with due regard for the interests of the victims. There is an obligation to pay attention to the victims".[62] The first judge, cited above, did just this by making a provision for some victims to come and testify – listening to the victims directly before them in the Chamber. In doing so, they were actively listening to them.

In connection with the sentiment that victims were stakeholders in the system, this judge also gave another reason for bringing them to testify, which shows a desire to understand the impact of the crime on the victim, not simply the perpetrator's guilt. Interviewees were not asked if victims' harm was or should be a factor considered at sentencing; rather, they were asked the broader question of what role, if any, victims could have during and after the trial. This judge continued his example, detailing that he and another judge called on the Prosecution to "hand-pick the most important witnesses" to "bring them in and let them say what … hell they went through. It will help [us] assess the sentence better".[63] The judge was speaking here of victim-witnesses, and expressed the belief that by allowing victims to speak of the harm they had experienced as part of, and resulting from, the criminal act, judges could encompass this in their determination of the sentence. Similarly, another judge, when asked about the role of victims, expressed his belief that victim-witness testimony should be considered in sentencing the perpetrator. He stated that "coming forward with your story is I think often every important … then of course, that should be reflected in, one way or another, in sentencing".[64] These judges' reasoning spoke to the respect that victims had been accorded, by bringing them into this stage of the justice process, despite not being a necessary provider of evidence. This was an indication by the Tribunal that they cared not only about prosecuting the guilty, but also about the harm caused to victims. The judge's example is one positive counter to Christie's "conflict as properties"[65] as the Tribunal afforded (albeit a limited number) victims space to speak. This meant that the focus was not solely on the perpetrator. It was a recognition of the harm victims suffered, and a demonstration by the Tribunal that they were taking this into account. It was an example of putting into practice a criterion of good procedural

[61] Interview, Judge, The Hague, morning of 30/01/2017.
[62] Interview, Judge, The Hague, 25/01/2017, record of hand-written notes, not an audio-recorded interview.
[63] Interview, Judge, The Hague, morning of 30/01/2017.
[64] Interview, Judge, The Hague, 01/02/2017.
[65] N. Christie, Chapter 3, s.3.6.3.

justice, as victims were given voice[66] in the justice process. At the same time, however, the purpose of giving the victims voice is primarily for the judges to use in their role in determining a sentence; the reason was not for the well-being of the victim, though this may be a positive side-effect.

Another judge believed that victims' sense of justice had been achieved for those in their role in testifying, which he believed was therapeutic. He acknowledged he was "not in the shoes of the victims of the Balkan War [and] I am not talking to them, of course not," but from his position as a judge hearing testimonies, he had "the feeling the most important moment is that they can testify in court in the presence of this accused sitting here and he has to listen to the story of the victim. This is the most important thing".[67] For this judge, having their day in court was the best satisfaction that the ICTY could provide for victims. The judge's notion of victims' being able to tell their story is questioned throughout the literature on victims' participation[68] in criminal processes and by staff at The Hague itself. In relation to having the opportunity to tell their story, one staff member reflected that "the problem is that they want to tell you *everything*, and they're not allowed to. The judge has to stop them … so for some […] it can be quite a traumatic experience to come here and give evidence."[69] Scholars have also pointed out the negative effect of judges' interrupting[70] and, additionally, the adversarial approach wherein the prosecution challenges victims' testimony and status,[71] which had caused them to feel undermined. Victim-testimony in the trial chamber was not an opportunity for victim-witnesses to "tell their story" at ease as the judge believed. Furthermore, scholars who have empirically studied victim-witnesses have dismissed the notion that testifying produces a cathartic effect.[72] The judge's sentiment also hints at the notion of victim as being perceived as passive. From this judge's perspective, he believed that "the most important thing" for them was that they had their day in court, thus their role was now over.

These judges spoke of victims as witnesses, not victims more broadly. The judge who noted that he had asked the Prosecution to "handpick the most important" witnesses implicitly recognised that other victims were excluded. His action of handpicking a few victims from a large number underlines

[66] T. Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) *Crime and Justice* 30: 283-357 at 350. See Chapter 3, s.3.5.3.
[67] Interview, Judge, The Hague, afternoon 30/01/2017.
[68] See Chapter 4, s.4.3.1.
[69] J. N. Clark, 'Judging the ICTY: has it achieved its objectives?' (2009) *Southeast European and Black Sea Studies* 9: (1-2) at 128, citing ICTY Chef de Cabinet, Gabrielle McIntyre.
[70] M.B. Dembour and E. Haslam, 'Silencing Hearings? Victim-Witnesses at War Crimes Trials' (2004) *European Journal of International Law*, 151-177 and cited in E. Stover, *The Witnesses*, at 87.
[71] E. Haslam, 'Victim participation at the International Criminal Court: a triumph of hope over experience?' in D. McGoldrick, P. Rowe and E. Donnelly (eds.) *The Permanent International Court: Legal and Policy Issues* (Hart, 2004); J. N. Clark, 'Judging the Tribunal: has it achieved its objectives?' at 128; and E. Stover, *The Witnesses*, at 131.
[72] E. Stover, *The Witnesses*, at 87.

the reality that in cases of atrocity crimes, not all the perpetrators' victims can be heard. This sentiment of there being too many victims was noted by others, who were keen to highlight the Tribunal's limited resources and capacity to do more for victims; this is discussed further below. In contrast to the rhetoric of the Tribunal's website that by punishing perpetrators it was bringing justice to victims, insiders at the Tribunal routinely noted that they simply could not bring justice to victims and presented different reasons for their attitude.

8.4. Victims' Sense of Injustice as Inevitable

This section considers how interviewees in The Hague (as well as many in BiH) expressed an attitude that victims would inevitably have been unsatisfied with the ICTY's dispensation of justice, as, given the nature of the crimes, no penal sentence can achieve substantive justice.[73] As sentences were perceived as lenient in the first instance, victims would have been dissatisfied regardless of UER. This underlying sentiment of victims' sense of injustice as inevitable further explains how victims were overlooked when it came to UER. This is not to say that judges and staff of the Tribunal did not care about victims; the sentiment of empathy for them was a theme throughout the course of the seventeen interviews in The Hague. A few interviewees expressed their hopeful belief that one of the Tribunal's outcomes was that victims would have a sense of justice,[74] but the majority of interviewees frequently resigned themselves to the practical limitations the Tribunal faced.[75] Some expressed the sentiment of an impossibility of achieving just satisfaction for victims when it came to punishing atrocity crimes,[76] others applying victims' sense of injustice to all victims of crimes in general.[77] The notion of the impossibility of just satisfaction in retributive punishment was also reflected by interviewees in BiH. However, BiH interviewees perceived UER as compounding an injustice – the lenient sentence; and furthermore, in contrast, the majority of BiH interviewees did not share the sentiment of The Hague's limited capacity (detailed s.8.5).

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[73] A. Carcano, 'Sentencing and Gravity of the Offence in ICL' (2002) *The International and Comparative Law Quarterly* 51(3): 583-609; S. Kutnjak Ivković and J. Hagan, *Reclaiming Justice: the International Tribunal for the former Yugoslavia and Local Courts* (Oxford University Press, 2011) at 19 and K. McEvoy and L. Mallinder, 'Amnesties in Transition: Punishment, Restoration and the Governance of Mercy' (2012) *Journal of Law and Society* 39(3): 410-440 cited in R. Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia' (2016) *International Criminal Law Review* 16: at 6.

[74] Five of the 17 expressed their belief that the ICTY had, albeit to a limited extent, brought a sense of justice to victims.

[75] Ten of the 17 interviewees reiterated that the Tribunal had an extremely limited mandate in relation to victims (as witnesses) and further a limited budgetary capacity in relation to outreach.

[76] Six of the 17 interviewees expressed the sentiment that no punishment could achieve satisfaction due to the gravity of the crime.

[77] Four of the 17 interviewees expressed the sentiment that there was the general rule in criminal law that victims would always wish for the maximum sentence.

8.4.1. Too Many Victims

The nature of atrocity crimes, primarily mass victimisation, practically produces an overwhelming task of bringing justice to individual victims. In contrast to ordinary serious crimes in a national setting, where there is typically an identifiable number of victims,[78] atrocity crimes often encompass tens of thousands of victims. Apart from the fact that the Tribunal only prosecuted a limited number of perpetrators, even where a perpetrator is brought before the Court, not all the crimes he is accused of (with their corresponding victims) are prosecuted. Sometimes, the Prosecutor cannot obtain enough evidence to build a case for certain crimes, or will remove charges strategically. The "sheer number of victims require[s] selectivity in the procedures."[79] This fact was raised by one judge who was asked if he believed there would be any place for victim impact statements when it came to the consideration of early release. The judge was informed that, in the UK, in cases of serious harms, victims had the opportunity to provide a Victim Impact Statement to the Parole Board when the perpetrator was due for a grant of parole.[80] He responded by contextualising the issue in relation to victims who had been expected to testify, those who had been questioned by the OTP, but who had later been struck off the indictment when certain charges had been dropped. He reflected that this practice was already an injustice for these victims as it silenced them, and they had been denied the opportunity to testify: "I would emphasise again and again [in this context] – [who] should you ask? [victims] only from those municipalities that he was convicted [of crimes]?"[81] His statement suggests that there was a sense of it being almost unfair to actively engage those who had the good fortune to be recognised as victims in a process which had already excluded other victims because the areas where the crimes against them were perpetrated were struck off the indictment. This judge's statement suggests one reason why even victim-witnesses were not brought into the process of early release. This attitude was not readily accepted by the judge's colleagues or most stakeholders in BiH who suggested measures which could overcome them (s. 8.5).

8.4.2. Victims Will Never be Satisfied

In addition to this practical (victim population) limitation faced by the Tribunal in delivering justice to victims, interviewees in The Hague indicated that victims would never be satisfied with just

[78] R. Letschert and S. Parmentier, 'Repairing the Impossible: Victimological approaches to international crimes' in. I. Vanfraechem, A. Pemberton and F. Mukwiza Ndahina (eds.) *Justice for Victims: Perspectives on rights, transitional and reconciliation* (Routledge, 2014) at 223.
[79] S. Karstedt, 'From Absence to Presence, From Silence to Voice: Victims in International and Transitional Justice since the Nuremberg Trials' (2010) *International Review of Victimology* 17(1): 9-30 at 26.
[80] United Kingdom, Domestic Violence, Crime and Victims Act 2004.
[81] Interview, Judge, The Hague, 01/02/2017.

retributive justice, in particular because sentences would always be perceived as too lenient; [82] this view was often reflected in BiH itself.[83] One judge went further and applied this sentiment to all victims. Responding to the open question about the merit of victims' participation, he concluded that "everyone who is trained in criminal law knows that the sentence is always too high for the convicted person and is never high enough for the victim. That is part of the rule for criminal law".[84] The use of the word "rule" reflects the attitude that these early releases would, for these already perceived lenient sentences, inevitably be met with disappointment, and that any attempt to shift this would only be met with defeat. The sentiment of predictability of victims being disappointed by perceived lenient sentences was expressed by another Tribunal judge who argued that victims could never be satisfied with the sentences, which, in turn, led to the assumption that they would inevitably be aggrieved by early release. He stated that "it is difficult for the people on the ground to understand that someone who has been sentenced, someone who has been found guilty of such serious crimes, not only is not given the death sentence … but is given a sentence and then he doesn't even serve that sentence, he gets out … [at] two-thirds".[85] What these statements indicate is a sense of resignation, due to victims expressing disappointment with perceived lenient sentences, which could be done to counter this at UER.

With the view expressed that substantive justice was not obtainable for victims who desired "hard justice",[86] that is, longer sentences - served in full, he (along with others) was asked if any particular procedural practices could have been employed to bring a sense of justice despite a sense of disappointment with the sentence and the subsequent early release – i.e. whether legitimacy of exercise through good standards, such as transparency, clear communication and justification[87]

[82] Six of the 17 interviews expressed the sentiment no punishment could achieve satisfaction due to the gravity of the crime.

[83] 21 of the 51 interviews argued that sentences would always be perceived too lenient. S. Kutnjak Ivković and J. Hagan, *Reclaiming Justice: the International Tribunal for the former Yugoslavia and Local Courts* (Oxford University Press, 2011) at 19. Kutnjak Ivković and Hagan conducted seven surveys in Sarajevo, Zagreb, Vukovar, Belgrade and Croatia between 1997 and 2005 and found that victims were generally in favour of the heaviest possible penalties from the death sentence to life imprisonment. The judge's assertion was illustrated by a member of staff who worked with victim-witnesses, and who applied it more pertinently to victims of atrocity crimes convicted at the Tribunal. She reflected that "victims seeking justice that means the maximum possible conviction that there could be. What you hear often is … 'I have lost two sons and this equals to twenty-five years?' They are thinking in a very human … way. [I]f you have lost … a family member, or you have been a victim of rape, [what] does that mean that this is only ten years? [whereas] - I have been ruined for life".

[84] Interview, Judge, The Hague, 01/02/2017.

[85] Interview, Judge, The Hague, morning, 30/01/2017.

[86] This expression was used by one NGO Director in BiH, 07/11/2017.

[87] J. Thibaut and L. Walker, *Procedural Justice: A Psychological Analysis* (Erlbaum, 1975) and cited in R. Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia' (2016) *International Criminal Law Review* 16: 1-38 at 3. See standards by which legitimacy can be obtained – Chapter 3, s.3.5. Specifically, in relation to International Criminal Justice see: C. Stahn,

could ameliorate a deficit in the legitimacy of outcome, i.e. the declared sentence not being fulfilled. The concept of "legitimation through justification", as set out in Chapter 3, whereby scholars have argued that institutions "must offer public justifications of at least the more controversial … policies"[88] was put to Tribunal interviewees. For example, in the case of an early release, an accompanying explanation could be provided. This idea was put to a Tribunal judge, who sharply responded in the negative, asserting a sense of inevitable victim dissatisfaction: "Outreach can do a lot, but they are limited ... you have to forget the living generations … those are hopeless, lost. Our hope is with the children that are still at school and the children who will be born".[89] This attitude was not expressed in interviews with Outreach staff, but this judge's statement points to a mind-set that he had given up on the current generations and why judges felt it unnecessary to explain their reasoning to the victims in BiH. Outreach could try, but there was a sense of inevitability that they would not succeed in bringing a sense of justice to the current generations.

8.4.3. Judicial Decisions too Complicated for the Layman

This judge did not believe the practice of "legitimation through justification",[90] providing clear reasoning and justifications as to why the UER decision was taken, could ameliorate injustice which resulted from perceived lenient sentences and UER. This thesis' findings counter this judge's assertion that the provision of reasons as to why UER occurred could not lessen a sense of grievance at controversial practices (detailed in s.8.6.3). Further, the findings reiterate what empirical studies have found, that is, that the respectful treatment of victims and those engaged with courts and law enforcement agencies can ameliorate frustration with the overall outcome.[91] Although these studies focus on stakeholders engaged in the process, the same could be applied to those engaged with the ICTY via Outreach or Public Relations. Respectful treatment would include an explanation of why the decision, perceived as illegitimate, was taken. This assertion is reflective of Suchman's recommendations for institutions "Managing Legitimacy", where he proposed that institutions may be able to "preserve a modicum of cognitive legitimacy" even where they cannot justify [disruptive events], [they can] at least explain them.[92] As noted in s.8.2 in the interview with the NGO Director

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'Between 'Faith' and 'Facts': By What Standards Should We Assess International Criminal Justice?' (2012) *Leiden Journal of International Law* 25: 251–282 at 268-269.

[88] A. Buchanan and R. O. Keohane, 'The Legitimacy of Global Governance Institutions' in L. H. Meyer (ed.) *Legitimacy, Justice and Public International Law* (Cambridge University Press, 2009) at 29.

[89] Interview, Judge, The Hague, morning 30/01/2017.

[90] See Chapter 3, s.3.5.5.

[91] Y. Huo and T. Tyler, *Trust in the Law: Encouraging Public Cooperation d with the Police and Courts* (Russell-Sage Foundation, 2002) and Thibault and Walker, *Procedural Justice: A Psychological Analysis* (Erlnaum, 1975). See Chapter 3, s.3.5.3.

[92] M.C. Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) *The Academy of Management Review* 20(3): 571-610 at 598. Who noted that "anomalies … external shocks threaten the legitimacy of even the most

in Sarajevo, there was a sense of frustration that they had "never received a clear answer"[93] as to why the practice of UER occurred. Her statement and accompanying frustration indicated that either her NGO had asked but had not been provided with clear reasons, or she had never heard one articulated clearly by the Tribunal. Her sense of frustration was not only at the grant of an UER, but the fact that she had not received an explanation as to why it happened.

The same judge was asked whether the standard of "legitimation through justification" could be applied to justify redactions from early release decisions – albeit not using this phrase. A number of the Presidents' early release decisions text has been either blacked out or replaced with [REDACTED] which denotes secrecy. Usually, redactions relate to physical and/or mental health issues, or cooperation with the Prosecutor, although this is not made explicit.[94] One possibility to lessen the sense of information being hidden would be providing an explanation for the redaction; additionally, an explanation would also enhance transparency, a standard by which legitimacy of exercise can be assessed.[95] Although providing such an explanation would not disclose information (the standard of transparency), it would make it less opaque by providing an explanation for why the text has been removed. The judge was asked if he believed that an explanation as to why redactions were made could be provided to explain the reasons for them - for the sake of the public reading them and as a matter of transparency, which was one of the purported good administration of justice goals of the Tribunal.[96] He was quick to disregard this option:

> No … we have a job to do … We are a court of justice, many of the decisions are legal and the public will never understand it in any case. So, if there is a need to redact – full stop. The public needs to be educated to understand that there must have been a reason for the redaction, full stop. You can't go beyond that to explain to the public "listen there are redactions because of this, because of that' it would be a never-ending story.[97]

The statement is contradictory, as the judge asserted that the "public will never understand" but also that "they should be educated". This statement was made as the judge responded to the question of the President himself or herself providing an explanation in the early release decision, for example by way of a footnote. His sharp response indicated that he did not believe that it was for

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secure organisation, especially if such misfortunes … are left unaddressed", that is; where these anomalies arise positive actions may be required for legitimacy to be "repaired".

[93] Interview, NGO Director, Sarajevo, BiH, afternoon 06/11/2017.

[94] For example, in regard to the Presidents' early release decisions of Bala, Kovač, Lazarevic, Naletilić, Radić, Ojdanić, Sainović, Strugar the redactions have a footnote which references a psychologist report, and are considered. In relation to cooperation with the Prosecutor, the Mrđa, Momir Nikolić, Šantić and Vasiljević decisions have redactions under the section of cooperation with the Prosecutor.

[95] See Chapter 3, s.3.5.4.

[96] M. Schrag, 'Lessons Learned from ICTY Experience' (2004) *Journal of International Criminal Justice* 2: 427-434 at 428.

[97] Interview, Judge, The Hague, morning 30/01/2017.

the judges themselves to explain to the public, although the public need to "be educated", he does not suggest by whom. Further, the judge's word "'educated" denotes a top-down approach he had in thinking about the Tribunal's engagement with the war-affected population (including victims). The judge's top-down approach reflects an approach, *prima facie,* taken by the Tribunal in its establishment of its Outreach Programme. The 1999 Annual Report's explanation for Outreach, sounds much like an education programme, which would ensure "victims [were] *aware of* and *understanding* the war and its causes" and the "populations of the region are *informed* about the work of the Tribunal and *understand its significance*".[98] Outreach was effectively an "information campaign" which sought to "improve [The Tribunal's] reputation"[99] to its stakeholders, rather than listening and actively engaging with them. They were considered "passive recipients"[100] who would be educated about the conflict they had survived, and informed as to how they were being brought justice by the Tribunal. And at the same time, the judge noted that there were limitations as to the lengths to which they would be willing to go in order to do so.

He did not elucidate as to who would educate the public, and this point was not followed up. But it expresses the sentiment that there was a responsibility of some other entity to "educate" the public. Unfortunately, an interview with Outreach was not obtained, but, in speaking with staff from External Relations, they perceived early release as a judicial role and did not see any role for themselves in clarifying the matter with the public. Bridging the gap between the judicial decision and the impact that decision had on how the Tribunal was perceived was not considered to be within their remit. This interviewee stated, in relation to her views on redactions and how they may be perceived in the region, "[this] decision is a judicial matter so leave it up to the judge. I can't really comment on that".[101] These two comments, from the judge himself and External Relations, indicate that there was an unwillingness to take up the role of explaining judicial practice.

This perception that there was no value in judicial details being explained was extended to the overall early release practice. This failure to engage with victims on the matter of early release has

[98] Emphasis added.
[99] M. Tripovic, 'Not in Our Name! Visions of Community in International Criminal Justice' in M. Aksenova, E. van Sliedregt and S. Parmentier (eds.) *Breaking Cycles of Mass Atrocities: Criminological and Socio-Legal Approaches in International Criminal Law* (Hart, 2019) at 171.
[100] M. Tripovic, 'Not in Our Name! Visions of Community in International Criminal Justice' M. Aksenova, E. van Sliedregt and S. Parmentier (eds.) *Breaking Cycles of Mass Atrocities: Criminological and Socio-Legal Approaches in International Criminal Law* (Hart, 2019) at 175.
[101] Interview, Staff Member, The Hague, 27/01/2017.

created a sense of injustice for victims, often as an ongoing sense of disappointment in the Tribunal. UER is a practice, like plea bargains, which was not expected, where a perpetrator benefits and no justification is provided to those who have been harmed by that perpetrator. J.N. Clark's study on victims' community's perceptions of plea bargains found little outreach was undertaken to explain the practice of plea bargains, in a country where there had been no such practice in the domestic criminal courts.[102] Although judges had articulated the foreseen benefits in their sentencing judgments, no victims had read the statement made by the defendant.[103] The purported benefits to reconciliation and truth-finding were absent for victims.[104] Clark suggested that, if reasons were given for controversial practices, they may be perceived as less controversial.[105] This thesis' findings demonstrate that the same may be said for UER; if their reasoning (a second chance to perpetrators who were rehabilitated, Chapter 6, s.6.7) and an explanation (limited capacity - reliance on enforcement state, see s.8.6.3) was provided to people in the region, it may be perceived as less offensive.

8.5. The Perceived Boundaries of a Duty of Care to Victims

8.5.1. Perceptions of a Duty of Care to Victims Post-Trial

In addition to the sense of resignation that led to victims being overlooked at this stage, another two reasons for UER operating as it did, without decisions being communicated to either victim-witnesses or victims more broadly, were presented through the interviews. One was a strictly legalist approach, that in domestic law early release (albeit not unconditional) was a general practice; and the other more philosophical approach stressed the right of the perpetrator to a second chance, which, however, neglected to consider the extent to which that may differ in a post-conflict society. Both approaches raise important questions, which this thesis argues should be addressed, about the principle of a duty of care to victims and where its boundaries lie; and how this duty of care may differ in relation to victims of atrocity crimes.

The view that there was a limited duty of care to victims and that the duty ends post-trial was expressed by the minority of interviewees in The Hague and strongly argued against by the overall majority of interviewees. The converse opinion, that a duty of care lies beyond the realm of the trial stage, is indeed more in line with the international standards, practice in EU states, and, perhaps,

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[102] S. Kutnjak Ivkovic, 'Justice by the International Criminal Tribunal for the Former Yugoslavia' (2001) *Stanford Journal of International Law* 37: 255-346 at 288 and see Chapter 4, s.4.4.1.
[103] J.N. Clark, 'Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation' *'Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation'* (2009) *The European Journal of International Law* 20(2): 415-436 at 432.
[104] J.N. Clark, 'Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation' at 418.
[105] J.N. Clark, 'Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation' at 431.

most significantly, the guidelines of the Tribunal itself. A number of questions were asked of The Hague interviewees, as to whether they believed UER was in line with good standards of legitimacy (transparency, participative legitimation and legitimation through justification), outlined in Chapter 3,[106] were ever contemplated by The Tribunal or considered as potentially beneficial for maintaining the legitimacy of the Tribunal. Similar and additional practices were frequently proposed, unprompted, in BiH by interviewees themselves. Their proposals echoed the practice proposed by scholars who have advocated for good procedural justice[107] to increase victims' sense of justice in International Criminal Justice which, they argue, assists in enhancing and maintaining International Criminal Justice's perceived sociological legitimacy. Before turning to these recommendations, the following section sets out two views raised by interviewees in The Hague. Both these views, in effect, conceive perpetrators as equivalent to ordinary criminals rather than focusing on their nature as perpetrators of atrocity. These views led to an approach of excluding the victims at this stage.

8.5.2. A Narrow Application of the Law

The strict legalist approach was taken by one staff member who responded to the question of whether she believed a role should be accorded to victim-witnesses after the trial process. She was quick to respond: "Is it necessary to inform them of the early release? It is not in the Statute. From a purely legal position it is all about the application of the law".[108] As outlined in Chapter 5, the black letter law relating to early release was minimal, and showed how an approach, in favour of the perpetrators, was taken (benefit of the doubt in their evidence of rehabilitation, for example). Yet until April 2018,[109] in the case of the decisions of early release, this did not extend to a broad approach to victims' interests formally being taken into account. For example, although there was an explicit provision in the Practice Direction, which provided the President with the option to request the Registry to "inform persons who had testified … during the trial of the convicted person of his or her release" and further to "forward the decision" of early release to "other interested parties" neither of these options were taken.[110] The interviewee's rhetorical question and response were followed by a broader question of where she believed the rights of victims ended; she responded in

[106] See Chapter 3, s.3.5.
[107] See Chapter 4, s.4.3.1: Stover, Dembour and Haslam, N. Patterson, L. Moffet and R. Killean specifically in relation to how ICTs treat witness-victims; and J.N. Clark, Hodžić and Klarin who effectively advocate for better outreach to war-affected communities.
[108] Interview, Staff Member, The Hague, 03/02/2017.
[109] Pušić, Early Release Decision, 20 April 2018. In the Pušić decision the President refers to two statements provided by Victims' Associations which indicates that the President had actively considered these statements, in contrast to the President referencing the Prosecutor's attempt to draw attention to victims by explicitly stating he would not take any further information into account.
[110] At least not in the formal process, according to staff of the President's Office and noted by Tribunal judge, morning, 27/01/2017.

the narrow sense of the ICTY itself: “In the Statute victims don’t have “rights”, they are considered. For me at this stage it is about the prisoner having the opportunity to apply for early release”.[111] This statement reflects two sentiments. First, is a strict legalist approach, and second, that this stage of the justice system is purely perpetrator focused (s.8.5.3).

The strict legalist approach illustrates one reason as to how victims were overlooked at this stage. As noted above the Statute did not give victims any place, other than as witnesses, and the provision was for their “protection”.[112] This provision frames them as passive recipients of paternal care rather than as right-holders – for example the right to be informed of an early release decision being granted. As Weinstein argued, international justice has construed the notion of the ideal victim as a “sacrificial animal”[113] who should be considered but not necessarily communicated with. This strict legalistic approach was the stance taken also by one judge who was interviewed. This judge when asked if there was a role for victim-witnesses to be “consulted or notified” in relation an early release decision in home country – which was to be followed by whether this could have been considered by the Tribunal - interjected and said that in his home country victim-witnesses were not consulted, although he did not know whether they were notified. He then stated his justification for his country’s domestic approach: “Victims are victims, and witnesses testifying and then the guilt and so the amount of guilt is established by the court; later on they shouldn’t have a say in it because it is the state who is enforcing the sentence, not the victim”.[114] His response was categorical; he took a narrow question and began discussing it in broader terms as he spoke about victims generally, rather than his country’s law. This is certainly the case that the state (and in the case of the ICTY – the President) is enforcing the sentence, but the question was whether or not victims should be consulted or notified of the decision, not whether they could decide its outcome. He then concluded his statement as he reflected: “And I don’t know what criteria they [could] apply: they [victims] would say “no, no, no, no, he shouldn’t be early released’ or “fine there is some remorse, he should be early released”. Thus, he concluded that “it shouldn’t be for the victim to have a say in that respect”.[115] His statement indicates that this judge was unwilling to probe into the complicated territory of contemplating criteria (other than rationalisation of the President and his

[111] Interview, Staff Member, The Hague, 03/02/2017.
[112] Article 22 notes largely defines victims as persons to be protected in the course of the trial process: “Article 22 Protection of victims and witnesses” – *emphasis added* – providing protective measures for their safety.
[113] H. Weinstein, ‘Victims, transitional justice and social reconstruction: Who is setting the agenda?’ in I. Vanfraechem, A. Pemberton and F. Mukwiza Ndahina (eds.) *Justice for Victims: Perspectives on rights, transitional and reconciliation* (Routledge, 2014) at 177.
[114] Interview, Judge, The Hague, afternoon, 30/01/2017.
[115] Interview, Judge, The Hague, afternoon, 30/01/2017.

colleagues) to apply for the justification for an early release of perpetrators. His final remark "victims shouldn't have a say in that respect" implies an underlying sentiment, that victims are perceived as passive. Here, certainly, the judge did not consider them as being agents in the justice process post-trial; they have had their day in court and now there is no legal duty afforded to them under the black letter law. A counter to this judicial attitude was stated by one judge in BiH, detailed s.8.6.4.

This view of victims having a strictly limited role was asserted by another judge. In the interview it was noted that the President had the option to inform "other interested parties"; he interrupted and quickly stated, correctly, that this was "not in the Statute the Rules" and thus "it is not mandatory".[116] His statement indicates that consideration for victims to be notified had not been given, since it was not required for them to do so. These three interviewee statements considered in this section illustrate a strict black letter law approach – the legal boundaries of a duty of care to "consider"[117] the victim was only in their role as victim-witnesses during trial, and when the judges were not formally required to consider them, they would not. This strict approach, is, as discussed in s.8.6, out of step with good practice when it comes to EU standards which recommends victims of serious, violent crimes are notified of their perpetrators' release from imprisonment.[118]

8.5.3. The Perpetrator and their Right to a Second Chance

In addition to a strict reading of the law, another more philosophical approach was indicated in the second half of the Staff member's assertion that "in the Statute victims don't have "rights", they are considered. For me at this stage it is about the prisoner having the opportunity to apply for early release".[119] This philosophical approach was premised on giving the perpetrator a second chance. The emphasis at this stage is on the perpetrator alone. The judge above, who asserted that victims should not have a say, took this same approach and articulated that, despite being uncomfortable with the "little formulaic" approach of the Tribunal's Presidents' assessment of rehabilitation of the perpetrator, it was for the Tribunal not the victims to decide on the process of early release. He believed all perpetrators had the right to be reintegrated into society. He did not, however, consider

[116] Interview, Judge, The Hague, morning, 30/01/2017.
[117] Article 22 of the Statute
[118] EU Directive 2012/29/EU of the European Parliament and the Council of 25 October 2012, Article 6 (5). There are similar provisions set out in the 2001 Framework Decision which this Directive replaced and extended, notably – "Member States shall take the necessary measures to ensure that, at least in cases where there might be danger to the victims, when the person prosecuted or sentenced for an offence is released, a decision may be taken to notify the victim if necessary", Article 4(3) of Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings.
[119] Interview, Staff member, The Hague, 03/02/2017.

the different nature of return for perpetrators of atrocity crimes returning to BiH; rather he spoke in terms of his home country whereby controversial prisoners, "lifers", were released, thereby not serving their potential full sentence of life and thus effectively being granted early release. This meant that:

> not everybody is happy with some people running around … and then all of a sudden some newspapers, groups, found out "oh, he is living here' and … even with violence prohibits the reintegration of this person … if you notify for instance groups or organised victims, where should these people go? … it is a very delicate question and I have no final answer … but I know sometimes those who are released and do their utmost to have a legal life now … [get] pushed into hiding again … there is a high risk of treating them in a wrong way. [120]

This approach, however fails to take into consideration the context of atrocity crimes. In post-conflict BiH, civilian victims' groups are not in a position to hound perpetrators into hiding - rather, as Chapter 7, s.7.5 illustrated, many perpetrators return to a hero's welcome. This judge's mind-set of perpetrators returning as potential outcasts is simply not the reality on the ground. It speaks to the criticism of the Tribunal as being a "distant court"[121] removed from the lived reality of its stakeholders in the region.

Another type of flaw revealed in this attitude of emphasising perpetrators' right to a second chance can be seen in the assertion of one judge in BiH that victims should not be considered at this stage because once imprisoned, the perpetrator moves into:

> the category of convicted persons ... he does not have anything to do with the court now, nor with the victims, no relations with anybody for that matter. Now he lives in another world, in the world of convicted persons. What are standards for these kinds of people? First standard is to respect human rights and freedoms, and what after that? Right to rehabilitation".[122]

As argued in Chapter 6, this thesis does not disagree with the right to rehabilitation, but the significant point from this judge's statement is the misconception that the perpetrator no longer has any "relations with anybody". At the point of early release, the perpetrator returns from the "world of the convicted person" to that of the post-conflict society, and included in that society are their victims, who are, as the interview analysis indicated, still experiencing their loss and are not unaffected by the early release.[123]

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[120] Interview, Judge, The Hague, afternoon 30/01/2017.
[121] 'A Distant Court' Part I in B. Swart, A. Zahar and G. Sluiter (eds.) *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press, 2011) 7-82.
[122] Interview, Judge, Sarajevo, BiH, 03/11/2017.
[123] As detailed s.8.2.

8.5.4. A Duty of Care to Victims

In contrast to these approaches which focus on a duty to give the perpetrator a second chance, many interviewees both in The Hague and in BiH believed there was an ongoing duty of care to victims. Primarily, this duty of care was in relation to victim-witnesses but was applied more broadly to victims who had experienced harm. All NGOs, IGOs VAs, Independent Experts, and Prosecutors in BiH perceived the Tribunal as having an ongoing duty of care to victim-witnesses, and most believed that victim-witnesses should be notified of early release. As one independent lawyer asserted, they owed it to victims, because without victim-witnesses testifying before the Tribunal, it would not have the evidence to convict those it indicted; "the verdicts actually rely on the victims".[124] This belief was expressed by another interviewee who said that not notifying victim-witnesses was "unfair … you asked for their help … they come and give their testimonies … and then what do you do? Convict the person and let him out so quickly".[125]

The notion of there being a duty of care despite not being a legal obligation was articulated by another interviewee who was asked if victim-witnesses should be notified of an early release. She immediately answered:

> absolutely … it's kind of a moral duty … to notify the person who has given a lot … when they are testifying. They should at least, if the perpetrator is coming back earlier … be informed … imagine … the state of shock of the person if they see the perpetrator somewhere in a local shop and they [were] thinking that he should be in prison. So … that is a *very* important moral obligation that we all have to the survivors who testify, or not testified even, but especially those who have testified.[126]

The duty of care to victims-witnesses extending beyond the trial process as being a matter of good practice, an *ought to* be, despite not being a mandatory obligation, was raised by Tribunal staff who had direct and ongoing contact with victim-witnesses. One reflected that "in an ideal situation that would be the best [for them to be informed] because … one of the major guidelines [VWS] is that we have to provide witnesses with information".[127] The Witness and Victims Unit remains part of the Tribunal's Residual Mechanism, and has ongoing responsibility to provide "support services to witnesses who have previously been called to appear before the Tribunal or the Mechanism and liaises with national and local authorities on those issues".[128] This interviewee's colleague, based in

[124] Interview, Independent Lawyer with professional experience with the Tribunal in BiH, Sarajevo, BiH, 22/12/2017.
[125] Interview, Independent with professional experience engaging with victim-witnesses in Srebrenica, Sarajevo, BiH, 21/12/2017.
[126] Interview, Independent expert with professional experience of working with Victims of SV of the conflict, Sarajevo, BiH, 16/11/2017.
[127] Interview, ICTY/MICT Staff Member, The Hague, 26/01/2017.
[128] Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Carmel Agius, for the period from 16 November 2018 to 15 May 2019, UN Doc at para. 29.

Sarajevo, agreed that "they should be considered in this process more than they are"[129] but explained that as of yet they had "not reached a final conclusion" as to what were "the key milestones" in the process about which to inform witnesses.[130] This finding from the Witness and Victim Unit speaks to the fact that realities on the ground shape practices, that is, that practices develop not only necessarily from a deliberate approach but simple oversight, which can be addressed, and practices are altered, which, as we shall turn to below, may now have been the case.

8.6. What can be done for victims at this stage of the justice process?

8.6.1. Standards to Regain Legitimacy

The notion of the Tribunal's limited capacity to bring a sense of justice to victims, frequently expressed with a sense of resignation in The Hague, contrasted to interviewees in BiH who often spontaneously proposed specific measures which they believed could increase victims' perception of The Hague's legitimacy, despite the non-fulfilment of the sentence. These findings, of proposed measures, in part answer the sub-research question on the perceptions of the legitimacy of UER. The interviewees' proposed measures which they believed could counter or lessen frustration of UER indicated that they perceived the Tribunal as having the capacity, which it failed to utilise, to put in place these standards of legitimacy. Two of these recommendations reflect criteria spelled out by scholars exploring procedural justice as a standard by which to obtain legitimacy. Such scholars have argued that elements such as the "the quality of interpersonal treatment … when dealing with authorities"[131] and "voice"[132] increase confidence in the criminal justice system. These standards have been advocated for by victimologists and criminologists who assert that these are valuable, as victims' underlying wish is recognition by the system.[133] This research, as far as this researcher can see, has been applied to exploring perceptions of victims within the criminal justice system. Findings from this study indicate that these elements of good procedural justice can be extended to victims outside the criminal justice system, and beyond the trial process. Let us first turn to those who were already engaged in the system, recognising that, in the case of atrocity crimes, these victim-

[129] Interview, Tribunal Staff Member, Sarajevo, BiH, 08/11/2017.
[130] Interview, Tribunal Staff Member, Sarajevo, BiH, 08/11/2017.
[131] T.R. Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) *Crime and Justice* 30, at 350.
[132] L. Musante, M.A. Gilbert and J. Thibaut, 'The Effects of Control on Perceived Fairness of Procedure and Outcome' (1983) *Journal of Experimental Social Psychology* 19: 223–238; T. Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) *Crime and Justice* 30: 283–357 at 350; and J.A. Wemmers, *Victims in the Criminal Justice System* (Kugler Publications, 1996).
[133] I. Vanfraechem, A. Pemberton and F. Mukwiza Ndahina (eds.) *Justice for Victims: Perspectives on rights, transitional and reconciliation* (2014, Routledge, Abington) 281; and 'theoretically" noted by D. Rothe, 'Can International Criminal Justice Victims' Needs?' in D. Rothe and D. Kauzlarich (eds.) *Towards a Victimology of State Crime* (Routledge, 2014) at 239.

witnesses do not represent the general victim population, the majority of whom have been excluded from the justice process.[134]

8.6.2. Treating Victims with Respect

The first measure that could be undertaken would be to inform victim-witnesses that an UER is forthcoming. One interviewee, a lawyer by training, and working with an IGO, recognised that there may be no "right" for a witness to be notified, no legal obligation to do so, but by "officially informing [it's] a sign of respect to the role of the victim and the survivor".[135] His assertion was already indicated by two interviewees at The Hague, who had noted on a few occasions specific victims had been informed by their office of upcoming early releases, and victims had appreciated being informed. One interviewee emphasised that when they informed victims they had been clear from the outset that:

> it wasn't for the purposes of getting their views … of whether it should happen but rather "it's going to happen' and because the particular sexual-gender based violence … it's better that you hear from us rather than you read it in the newspaper, or you bump into him at the corner. And they appreciated it; and it's a good practice.[136]

His assertion that they appreciated being informed, whilst being clear that their opinions were not being requested, echoes empirical research conducted by victimologists in the national criminal justice system, who have found that keeping victims of crime informed of the outcome of their case overall improved their sense of satisfaction even when they were not in favour of the sentence[137] or overall outcome.[138] It is an indication that victims do not necessarily wish to control the process[139] but do wish for recognition within the process. The value of information sharing speaks to the importance of the "interpersonal aspects" of procedural justice which Tyler described as the value of

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[134] D. Rothe, 'Can an International Criminal Justice System Address Victims' Needs? in D. Rothe and D. Kauzlarich (eds.) *Towards a Victimology of State Crime* (Routledge, 2014) at 246.

[135] Interview, IGO, Sarajevo, BiH, 19/12/2017.

[136] Interview, Senior Staff Member, The Hague, 24/01/2017. He then immediately spoke to the challenges posed in cases of mass victimisation, the "bigger circles" of victims as he put it, and reflected "who can we notify and why?" At a minimum it is recommended that victim-witnesses who are contactable via the Witness Unit can be informed.

[137] J.A. Wemmers, 'Victim Notification and Public Support for the Criminal Justice System' (1999) *International Review of Victimology* 6(3): 167-178 at 176.

[138] Y. Huo and T. Tyler, *Trust in the Law: Encouraging Public Cooperation with the Police and the Courts* (Russell-Sage Foundation, 2002) and J. Thibaut and L. Walker, *Procedural Justice: A Psychological Analysis* (Erlbaum, 1975) cited in R. Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia' (2016) *International Criminal Law Review* 16: 1-38 at 5.

[139] J. A. Wemmers, Victims in the criminal justice system (Kulger Publications, 1996) cited in T. Van Camp and V. De Mesmaecker (eds.) *Justice for Victims* (2014) at 281; and R. Killean 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia' at 16 citing B. Sheppard, 'Justice is no Simple Matter: Case for Elaborating our Model of Procedural Fairness' (1985) *Journal of Personality and Social Psychology* 49(4): 953–962.

"being treated politely and having respect shown for both their rights and themselves as people".[140] Other studies have found that not all victims wish to be informed of an upcoming early release.[141] However, offering them the opportunity to decide if they wish to be informed would be a means to show respect for them.

The use of the phrase "good practice" by the interviewee in The Hague speaks to the fact that supranational bodies have indeed already recommended these good practices. For example, the EU Directive on Victims recommends that Member States apply their penal laws, fundamentally to "ensure that persons who have fallen victims of crimes are recognised, treated with respect and receive proper protection, support and access to justice".[142] Although this Directive is categorised under "Victims of Crime *in* Criminal Proceedings" these recommendations extend beyond the trial process as they recommend "Member States … ensure … victims are offered the opportunity to be notified, without unnecessary delay, when the person … sentenced for criminal offences concerning them is released from or has escaped detention".[143] This includes the families of victims of who have died as a result of the crime.[144]

The value of these "good practices" has been illustrated through studies at both the national[145] and international[146] level. Studies have demonstrated the value of treating victims with respect through both positive and negative findings. In the negative, studies have indicated that victims engaged with the process, who wished to be informed, were disappointed when ongoing information was promised by the system but not fulfilled. This finding speaks to the importance of fulfilling promises when they are made. These pledges can be made implicitly, by treating victim-witnesses with respect at the outset, implying that they will be treated with respect on a continual basis. Stover's study of 87 victim-witnesses who had testified before the Tribunal illustrates this point. Stover noted that interviewees appreciated being well-prepared for their testimony in the courtroom, the support

[140] T. Tyler, *Why People Obey the Law* (Yale University Press, 1990) at 138.
[141] G. Rogers, 'Provision of Post-Sentence Advice to Victims of Serious Crimes: perceptions in One British Probation Service' (1999) *Crime Prevention and Community Safety: An International Journal* 1(4): 21-34.
[142] See https://e-justice.europa.eu/content_victims_of_crime_in_criminal_proceedings-66-en.do [accessed 27/12/2019].
[143] Directive 2012/29/EU of the European Parliament and the Council of 25 October 2012, Article 6 (5). There are similar provisions set out in the 2001 Framework Decision which this Directive replaced and extended, notably – "Member States shall take the necessary measures to ensure that, at least in cases where there might be danger to the victims, when the person prosecuted or sentenced for an offence is released, a decision may be taken to notify the victim if necessary", Article 4(3) of Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings.
[144] EU 2012 Directive, Preamble para. 19.
[145] J.A. Wemmers, 'Victims in the Dutch Criminal Justice System: The Effects of Treatment on Victims Attitudes and Compliance' (1995) *International Review of Victimology* 3 at 338.
[146] Victims' Perspectives about the Human Rights Violations Hearings, Ruth Picker Research report written for the Centre for the Study of Violence and Reconciliation, February 2005 at: https://www.csvr.org.za/component/customproperties/tag/Publications%20by%20subject-Truth-Commissions?bind_to_category=content:10001,content:138 [accessed 27/12/2019].

provided by the Prosecutor and the Witness Support Unit who arranged travel arrangements and escort from their homes to the Hague and back.[147] Satisfied with this treatment, most of these witnesses wished for ongoing contact with the Tribunal post-trial,[148] and many who had no or little follow-up by the Tribunal staff expressed a sense of "abandonment".[149] The notion of a duty of care as on-going and valuable for victim-witnesses was expressed by one interviewee who had extensive experience with victims in BiH. She noted that:

> I don't think that is only necessarily the number of years that the person gets … it is the whole package … how they feel when they testify, how they are taken care of or not taken care of, what happens to them after they testify … if some other segments of the process would be better taken care of, maybe even the number of years that the perpetrator gets would have a lesser meaning for them if other segments were really nicely taken care of for them.[150]

The recommendation by the interview above, the notion of "the whole package" being important, was supported by Stover's findings that victims valued a follow-up thank you letter from The Hague.[151] The interviewee's statement above, and Stover's example, speak to the value of an element of procedural justice, good inter-personal treatment whereby those who have engaged with the criminal justice system are accorded respect.[152] The whole package, treating victims, including at the post-trial stage, proposed by this interviewee above, who had close engagement with victim-witnesses, was a standard of legitimacy which, when met, could maintain an institution's legitimacy. [153]

8.6.3. Legitimation through Justification

In BiH many interviewees wished for more than a notification of early release; many wanted the Tribunal to provide an explanation for UER. The vast majority of interviewees[154] (with the exception of judges) in BiH expressed a sense of shock when hearing of UER, many due to the gravity of the

[147] E. Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (University of Pennsylvania Press, 2005) at 90-91.
[148] E. Stover, *The Witnesses*, at 96.
[149] E. Stover, *The Witnesses*, at 96.
[150] Interview, Independent with professional experience with Women Victims of the war recommended that the Tribunal could notify VAs of upcoming early releases so they could share this with the members, does appear to be undertaken as has now been taken by the Tribunal as VAs public documents have indicated that the Tribunal did inform at least some associations of upcoming early releases – the VAs statements are available on the Tribunal's website.
[151] E. Stover, *The Witnesses*, at 96. A poignant example of its value is illustrated by Stover's mention of one such letter of thanks, signed by President Kirk-McDonald which was pressed onto the cover of a photo album containing the witness's friends and relatives who had died in the war.
[152] T. Tyler*, Why People Obey the Law*; T. Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) *Crime and Justice* 30: 283–357, 283, and A. Lind and T. Tyler, The Social Psychology of Procedural Justice (Plenum Press, 1998) at 111 cited in R. Killean, 'Procedural Justice in International Criminal Courts: Assessing Civil Parties' at 19.
[153] See Chapter 3, s.3.5.3 and Chapter 4, s.4.3.1.
[154] With the exception of one NGO interviewee and one survivor.

crimes which perpetrators were found guilty.[155] Stover's study did not explore the practice of UER, although he found that some victim-witnesses wished that Tribunal staff had explained how the verdicts and sentences had been reached in their case. This stated desire, of having controversial decisions explained, resonates with this thesis' findings from BiH and quantitative studies who have proposed that people, victims or not, "value having the reasons for actions of authorities justified and explained".[156] The proposition that people value decisions being explained and justified, was put forward in the context of atrocity crimes and prosecutorial strategy in the case of BiH. Judge Kroner's list of recommendations urged the BiH Prosecutor's Office to do just this:

> however unattractive a proposition it may be, it must be made clear to the public that, in order to make best use of … resources not all perpetrators can be prosecuted … Prosecutors must be honest with victim groups … Criticism … for a decision to prosecute or not to prosecute … may be mitigated if full and reasoned explanations are provided for the decision.[157]

Her recommendation implicitly denoted a duty of care to victims, as she asserted that "prosecutors *must* be honest with victims' groups".[158] She does not clarify why she authoritatively stated that victims' groups must be engaged with and honestly so. It is taken for granted that victims being treated respectfully is a widely accepted standard which requires no justification.

The complementary nature of procedural justice criteria (proffering honest explanations) and standards of legitimacy of exercise (transparency) expressed above by Judge Kroner's recommendation was illustrated in this thesis' findings. This finding does not claim to be representative but is nevertheless significant. There was a striking difference in attitudes between Victims Associations (VAs) who had actively engaged with the Tribunal and those who had not – that is, those who had experienced "legitimation through justification"[159] and those who had not. This standard of legitimacy, and the difference it made to perceptions where it was met and where it was not, also provides an answer to the sub-research questions as to perceptions of UER and why victims viewed the practice in the way they did. The two VAs who had the practice justified to them, despite being disappointed with the practice, were not aggrieved by it. One VA had been informed directly

[155] Across the range of stakeholders, NGOs, Independent Experts, Most interviews expressed either a sense of anger or shock, surprise, devastation at the grant of UER – the notable exception to this was judges, who, with the exception of one judge, indicated during the course of the interview that early release was a general practice that they had expected from the Tribunal also.

[156] T. Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' at 350.

[157] Her Honour Judge Joanna Korner CMG QC, 'Processing of War Crimes at the State Level in BiH' (OSCE, 2016) at para. 31.

[158] Her Honour Judge Joanna Korner CMG QC, 'Processing of War Crimes at the State Level in BiH' (OSCE, 2016) at para. 31. Emphasis added.

[159] See Chapter 3, s.3.5.5.

of early release, and believed it was a general practice under domestic law, and the other had the practice explained to him when he expressed his disappointment with it. The latter nodded as he recalled that the President had explained that the Tribunal had relied on the enforcement states, when the interviewee had asked the President as to why early release was happening. The President in this instance was perceived as proffering an honest explanation, and the interviewee's nod of recognition as he recalled that moment suggested that he did appreciate the honesty of the President. His and the first interviewee's sense of resignation contrasted to a sense of palpable distress and anger expressed by the other two VAs who had no contact with the Tribunal, thus no explanation provided to them. One of the VAs, as we were leaving, requested: "please underline: the Tribunal has lost all credibility".[160] This interviewee was informed at the outset of the interview that an executive summary of the thesis would be sent to all interviewees, both in The Hague and in BiH. Her request, "please underline" echoes the importance of voice and representation emphasised in procedural justice theories.[161] She clearly wanted her opinion of the Tribunal's legitimacy to be heard.

8.6.4. Giving Voice to Victims

The importance of allowing victims to be heard was a matter raised explicitly by other interviewees. This sentiment was not only expressed by NGOs, but by judges and lawyers, who asserted that some "space to acknowledge victims"[162] be provided - even at the grant of early release. One judge suggested that the establishment of "shadow courts" would have been valuable.[163] Shadow courts would allow victims' to go on record to voice their opinions on the release of perpetrators. She did not believe victims should be "consulted" at the grant of early release, as they would not "be objective" but asserted that shadow courts would give the opportunity to state their objections to it and why. The judge's proposition of "shadow courts" echoes recommendations voiced by Trumbull who has called for a more a victim-oriented approach to international criminal justice to take place outside of the criminal trial, notably at the sentencing stage and in reparations hearings.

[160] Interview, Victims' Association, Brčko, BiH, 14/11/2017.
[161] L. Musante, M.A Gilbert and J. Thibaut, 'The Effects of Control on Perceived Fairness of Procedure and Outcome' (1983) *Journal of Experimental Social Psychology* 19: 223–238; T.R Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' at 350; J.A. Wemmers, *Victims in the Criminal Justice System* cited R. Killean, 'Procedural Justice in International Criminal Courts' 1-38.
[162] Interview, Prosecutor, Banja Luka, BiH, 22/11/2017.
[163] Interview, Judge, Sarajevo, BiH, 12/12/2017.

In the case of the Tribunal this is too late, but for future tribunals it would be a recognition of victims as legitimate stakeholders in the international criminal justice system, beyond the trial process. One interviewee in BiH argued that "being consulted would show them [victims] that they are thought of as competent".[164] It would give them voice and allow their views to be heard, it may not change the outcome but asking their opinion would be a sign of respect. Some interviewees expressed reservations about consulting victims, noting that expectations should not be raised. However, raising expectations is not inevitable. As indicated by the two VAs victims are capable of understanding an institution's limitations; what is necessary is honesty, preferably from the outset. Further, establishing clarity from the outset assists in enhancing accountability, provides benchmarks both to guide the Presidents and by which external stakeholders could use to evaluate the President's actions.[165] If the practice had required justification, it may have made the President more mindful of the different stakeholders to whom he or she should seek to justify these decisions. In turn, having created this may have caused them to pause and reflect on establishing clear reasoning which could be justified to their stakeholders, including victims.

Despite the majority of interviewees in BiH, again with the exception of judges, believing that UER was an illegitimate practice, and with the exception of the one VA noted above, it did not undermine their perceptions of the Tribunal's overall legitimacy. As others have argued, legitimacy is not an assessment undertaken in isolation and perceptions are influenced by many other factors,[166] two of which we shall now turn to.

8.7. Sociological Legitimacy Assessments: Perceptions Shaped by the Context

8.7.1. Subjectivity: Injustices are Relative

Sociological legitimacy is subjective, as set out in Chapter 3; sociological legitimacy is a *belief* in an institution's normative legitimacy - it is an assessment of an institution's right to rule. A person's belief is influenced by other factors beyond that institution's control.[167] Simply put, context matters. As Orentlicher, in her most recent study on Bosnian and Serbian assessments of the ICTY has remarked, "the nature of [the ICTY's] influences has been shaped in no small part by each country's

[164] Interview, NGO, Tuzla, BiH, 15/12/2017.
[165] A.M. Danner, 'Enhancing the legitimacy and accountability of prosecutorial discretion at the international criminal court' (2003) *American Journal of International Law* 97(3): 510-552 at 548.
[166] S. Ford, 'Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms (2012) *Vanderbilt Journal of Transnational Law* 45(2): 405-476.
[167] M.C. Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) *The Academy of Management Review* 20(3): 571-610 at 574. 'Legitimacy is a perception or assumption in that it represents a reaction of observers to the organisations as they see it" and that view is relative to others.

political, social and economic landscapes".[168] In relation to legitimacy from victims' perspective, the overall "landscape" was the sentiment that victims of the war faced greater injustices at the hands of the BiH state. Victims' sense of injustice due to the perceptions of the perpetrators' human rights trumping theirs (s.8.2) was compounded by the fact that an appropriate reparations scheme was lacking at the state, entity and local levels. Moreover, BiH's population, victims included, faced economic hardship – high-level unemployment, loss of property and a devastated and fragmented infrastructure.[169] This factor was beyond the Tribunal's control, but the poverty besetting BiH was the lens through which victims saw perpetrators benefitting from "cushy European prisons".[170]

UER and the sense of injustice to victims was seen as relative to the injustice felt by victims at the hands of the Bosnian Courts prosecuting atrocity crimes. The perpetuation of an injustice to victims (s.8.2); the outcome of a lenient sentence handed down by the Tribunal as an injustice to victims' dignity, coupled with perpetrators UER after serving two-thirds of that sentence, was noted by a number of interviewees in light of the equally lenient sentences meted out by the Bosnian Courts sentencing these crimes.

There were two particular matters of controversy in BiH Courts' sentencing practices noted by interviewees. First, there was the live issue of fines in lieu of a prison sentence of less than one year.[171] This measure had been adopted by some courts in the RS and Brčko, including for perpetrators of wartime rape. The injustice of this sanction was noted by one interviewee when UER was being discussed; just as UER was perceived as a belittling of the gravity of the crime and the vindication of the dignity of the victim, so too was a fine in lieu of a prison sentence. Second, was a controversy at the end of 2013 beginning of 2014 whereby the State Court ordered the immediate release (pending retrial) of 14 perpetrators of atrocity crimes, including a number of perpetrators involved in the genocide at Srebrenica.[172] This was a decision taken in light of the Bosnian

[168] D. Orentlicher, *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia* (Oxford University Press, 2018) 3.
[169] C. Philpott and R.C. Williams, 'The Dayton Dialectic: The Significance of Property Deprivation and Repossession in the Context of Ethnic Cleansing' 149-176 and M. Moratti, 'Tackling Obstruction to Property Rights and Return: A Critical Assessment of the Practice of Removing Housing Officials in Bosnia and Herzegovina' 177-204 in D. F. Haynes (eds.) *Deconstructing the Reconstruction: Human Rights and the ROL in Post-war BiH* (Ashgate, 2008) and G. Ó Tuathail & J. O'Loughlin, 'After Ethnic Cleansing: Return Outcomes in Bosnia-Herzegovina a Decade Beyond War' (2009) *Annals of the Association of American Geographers* 99(5): 1045-1053.
[170] E. Stover, *The Witnesses,* at 142.
[171] See: https://balkaninsight.com/2016/08/10/bosnian-war-crimes-convicts-pay-to-stay-free-08-09-2016/ [accessed 27/12/2019].
[172] D. Orentlicher, *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia* (Oxford University Press, 2018) 375.

Constitutional Court's interpretation of the ECtHR's 2013 *Maktouf and Damjanović* decision[173] which ruled that the BiH State, in these two specific cases, had violated Article 7 by failing to apply the *lex mitor* principle under Article 7 of the Convention.[174] The sentences imposed for the crimes convicted were done under the 2003 Criminal Code which were more severe than under the 1976 Criminal Code.[175] This instance of blanket releases was raised as an example of how lenient the BiH criminal system was in its treatment of perpetrators. A large number of perpetrators were released, some of whom had returned to Srebrenica, where victims were reported to be "re-traumatised" by the early release of the perpetrators.[176] Although perpetrators convicted at The Hague frequently returned, they did so individually rather than in large numbers, and not at the same time.

The second type of victims' injustice was around the lack of transparency at the State Court's War Crimes Chamber. Two interviewees raised this matter as the question of redactions in early release decisions was raised. These interviewees had professional experience following the work of the domestic courts. As the redacted documents were handed over, both expressed an aversion to the redactions but noted to the effect that it was nothing in comparison to the lack of transparency at the state court. The redactions on a limited number of early release, some more extensive than others, was seen in light of practice of closed hearings for war crimes cases, which began in 2009 (after the OSCE trial monitoring programme ceased) and the anonymisation of court documents.[177] Redactions in early release decisions were frustrating, but the removal of perpetrators' health details was minimal in comparison to the anonymisation of court documents at the State Court's War Crime Chamber, which began in March 2012 (although modified in 2014).[178] In a number of cases, names of the defendants, the location of the crimes and other key information was replaced with initials.[179] The interviewee noted this practice after providing her thoughts on redactions in the early release decisions, "I understand that because the indicted people [have] rights like everybody

[173] *Case of Maktouf and Damjanović v. Bosnia and Herzegovina* (Applications nos. 2312/08 and 34179/08), 18 July 2013.
[174] Article 7 – no retroactive punishment "nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed". Subsequently, BiH Constitutional Court's decisions on 27 September 2013, 22 October 2013, 5 November 2013 and 23 January 2014 quashed entirely the criminal verdicts issued against the perpetrators. This finding rendered the relevant criminal convictions void and the perpetrators release was ordered immediately pending a retrial. para. 82 in TRIAL and others, *General Allegation on the situation in Bosnia and Herzegovina to the Special Rapporteur on Truth, Justice, Reparations and Guarantees of Non-recurrence*, February 2014.
[175] The FRY 1976 Criminal Code provided a maximum penalty of five years imprisonment or the death penalty.
[176] TRIAL and others, *General Allegation on the situation in Bosnia and Herzegovina to the Special Rapporteur on Truth, Justice, Reparations and Guarantees of Non-recurrence*, February 2014. This case was raised by two interviewees; Interview, NGO, Sarajevo, BiH, 27/10/2017 and Interview, Independent, 21/12/2017.
[177] D. Orentlicher, *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia* (Oxford University Press, 2018) at 346 and was raised by two interviews in BiH. Interview, NGO, Sarajevo, BiH, 27/10/2017 and Interview, Independent expert with professional experience of working with Victims of Sexual Violence of the conflict, Sarajevo, BiH, 16/11/2017.
[178] D. Orentlicher, *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia*, at 346.
[179] D. Orentlicher *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia,* at 345.

else". Although she did want to know what was redacted, she accepted the practice. She concluded her reflection by considering that "we have censorship from the State Court, we have censorship from the Prosecutor's office".[180] Her assessment of the legitimacy of exercise concerning redactions by the Tribunal was made in the context of what she considered censorship at the WCC. The second interviewee commented that, although she didn't like the practice, she "trusted" international judges more than the national judges.[181] These examples of stakeholders determining legitimacy via a comparison to other institutions is reflected in the scholarship on sociological legitimacy, and some scholars have recommended this comparative approach. Bottoms and Tankebe cited Aristotle, "[o]ften one of a pair of contrary states is recognized from the other contrary hence … we can learn a good deal about justice from studying instances of injustice, and vice-versa".[182] This examination of what characteristics illegitimate institutions have is, in fact, what the interviewees above have done – whereby their perceptions of the ICTY's legitimacy deficits are shaped by the parallel examination of the BiH justice system. The interviewee's reference to censorship indicates that she perceived the legitimacy standard of transparency[183] as being flouted by the BiH Courts, and thus the redactions in the ICTY's Early Release decisions paled in comparison. The domestic system was perceived to have greater legitimacy deficits, thereby making the ICTY more legitimate.

8.7.2. The Justice Cascade

The perceived illegitimate practice of UER and the injustice felt by victims was outweighed by the justice that the ICTY did bring about. Victims had seen all the indicted perpetrators face justice (although some were acquitted, and others died which spared them from full justice); that "some justice was done"[184] was better than none. There was the overarching opinion, expressed with conviction directly in seven interviews, that victims in BiH would have received no retributive justice, had it not been for the ICTY, a finding noted in other studies and most recently by Orentlicher in her most recent study.[185] The ICTY and its completion strategy[186] led to a "justice cascade"[187] in BiH.

[180] Interview, NGO, Sarajevo, BiH, 27/10/2017.
[181] Interview, Independent expert with professional experience of working with Victims of Sexual Violence of the conflict, Sarajevo, BiH, 16/11/2017.
[182] A. Bottoms and J. Tankebe, 'Beyond Procedural Justice: A Dialogical Approach to Legitimacy in Criminal Justice' (2012) *The Journal of Criminal Law and Criminology* 102(1) at 137.
[183] See Chapter 3, s.3.5.4.
[184] D. Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (Open Society Justice Initiative and International Center for Transitional Justice, 2010).
[185] D. Orentlicher, *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia* (Oxford University Press, 2018) at 96; and M. Klarin, 'The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia' (2009) *Journal of International Criminal Justice* 7: 89-96 who argued that "Bosnian Muslims, who although disappointed with The Hague "know that had it not been for the ICTY, there would have been no accused, no trials and no convictions" at 90.

Other victims, albeit not all, had seen their perpetrators brought before the domestic criminal courts. As the first interviewee above noted that if "The Hague didn't do that after the war we will not have sentences here in Bosnia's state court".[188] This was one of the ICTY's positive contributions to other victims who were not recognised as such on the ICTY's indictments. Some of these victims would now see their perpetrators punished, thanks to the ICTY.

This retributive justice was important for many, as it was recognition of the worth of the victim that their perpetrators were punished. The ICTY, in sentencing those it found guilty, had done so, and its completion strategy had given capacity to national courts to continue retributive justice for the remaining perpetrators, and UER, no matter how unpopular, could not erase that contribution.

8.8. Conclusion

This chapter has argued how the unconditional early release of perpetrators was widely perceived as an injustice to victims in BiH. It was a "second slap in the face"[189] from the Tribunal - an additional bitter pill to take after the lenient sentences it handed down, where the perpetrators were accorded the highest fair trial rights and, when punished, lived in comparative luxury to victims, who remained in BiH where they received no or little recognition from the state. For many victims, the punishment of the perpetrators was their only form of just satisfaction.

The chapter highlighted how victims, who were accorded pride of place in the ICTY's rhetoric of bringing justice to them, were overlooked at this stage, by a sense of resignation of retributive justice as never being able to achieve satisfaction and by a focus on the perpetrator's right to a second chance. From the interview analysis, the chapter has set out suggestions for the implementation of early release that could have ameliorated victims' sense of injustice. Almost all

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[186] F. Donlon, 'Rule of Law: From the ICTY to the War Crimes Chamber of Bosnia and Herzegovina' in D. F. Haynes (ed.) *Deconstructing the Reconstruction: Human Rights and the Rule of Law in Post-War Bosnia and Herzegovina* (Ashgate, 2008) at 284.

[187] K. Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (Norton, 2011). S. Kutnjak Ivković and J. Hagan's study of victims' from countries in the FRY noted that perceptions of the Tribunal's legitimacy had declined over the years, and their surveys indicated that the local populations chose national courts over the ICTY. The very fact that the local courts have taken on prosecutions of war crimes was they note due to the 'justice cascade' from the ICTY, see: S. Kutnjak Ivković and J. Hagan, *Reclaiming Justice: the International Tribunal for the former Yugoslavia and Local Courts* (Oxford University Press, 2011) at 152.

[188] Interview, NGO, Sarajevo, BiH, 27/10/2017.

[189] Interview, Senior Staff Member, The Hague, 02/02/2017.

interviewees (in both The Hague and BiH) believed that the Tribunal should explain and justify their decisions for early release. As a controversial practice, the Tribunal could have taken positive steps to sustain its legitimacy by explaining it. This course of action has been proposed in terms of other controversial decisions; by J.N Clark in relation to plea bargains being explained to victims' communities by ICTY Outreach staff,[190] and by Judge Kroner in relation to Prosecutors explaining their strategy.[191] This approach aligns with the standard of legitimacy of "legitimation through justification".[192] This is not impossible, and the Tribunal has on occasion made public statements explaining decisions and strategy.[193] The chapter provides some suggestions for any further *ad hoc* criminal justice mechanisms dealing with mass victimisation.

The chapter has also contributed to assessing the practice's impact on the ICTY's overall perceived legitimacy, and, as the preceding chapter noted, that illegitimate practice of UER was perceived as a blackspot, a flaw, but did not, ultimately, for the vast majority of interviewees, undermine the legitimacy of the Tribunal itself. Perpetrators had escaped one-third of their punishment, but they had not escaped justice completely. The preceding chapter outlined how, due to the specificity of BiH as a post-conflict ethnically-divided country, UER had aggravated repercussions, notably denialism (Chapter 7, s.7.5.3). This chapter, in contrast, has illustrated how the specificities of BiH, post-conflict justice system is perceived as lacking legitimacy, and appeared to have lowered a sense of injustice for victims created by UER. Victims faced greater injustices by their Court system – domestic sentences are more lenient and there is a greater lack of transparency which makes the Tribunal's illegitimate practice of UER pale in comparison.

As one interviewee reflected, "they expected justice from internationals, they know they will not get justice here".[194] Simply put, they expected more from The Hague Tribunal and they were disappointed. Nevertheless, if it had not been for the Tribunal "everything would have been swept

[190] J.N. Clark, 'Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation' 415-436.
[191] Her Honour Judge Joanna Korner CMG QC, 'Processing of War Crimes at the State Level in BiH' (OSCE, 2016) para. 31.
[192] See Chapter 3, s.3.5.5.
[193] ICTY Press Release 'International Tribunal issues first indictment dealing with Bosnian-Serb victims' 22 March 1999, which noted that the Čelebići "indictment, the first dealing with Bosnian Serb victims, illustrates the even-handed policy which has been repeatedly stated by Justice Goldstone, namely to "investigate and prosecute persons who may be responsible for crimes irrespective of the political or ethnic group to which they belong". See: https://www.icty.org/en/press/international-tribunal-issues-first-indictment-dealing-bosnian-serb-victims [13/01/2020]
[194] Interview, NGO Representative, Sarajevo, BiH, 16/10/2017.

under the rug".[195] For the victims, who wanted justice, some justice, even when cut short, was better than none.

[195] Interview, Staff Member, The Hague, 26/01/2017.

Chapter 9: Conclusion

9.1. The ICTY, UER and Legitimacy

This thesis has examined the final element of the Tribunal's exercise of power – the premature ending of the punishment it dispensed. It drew broadly[1] upon Beetham's framing for understanding legitimacy: "for power to be fully legitimate … three conditions are required: its conformity to established rules; the justifiability of these rules by reference to shared beliefs; and the express consent of the subordinate".[2] Thus the research explored UER,[3] and people's perceptions[4] to UER. Through empirical legal analysis of the decisions and qualitative interviews with stakeholders in The Hague and in BiH, the thesis argues that UER lacked normative legitimacy (Chapter 5 and Chapter 6). It also lacked sociological legitimacy. The research found that UER of perpetrators convicted by the ICTY was considered an illegitimate practice by the majority of inside (Tribunal interviewees) and outside (BiH interviewees) stakeholders, yet it did not de-legitimatise the ICTY overall. In the round, UER was considered a "blackspot" on the overall legitimacy of the Tribunal (Chapters 6, 7 and 8).

UER's legitimacy deficit arose due to judicial practice, fundamentally the Tribunal's Presidents' use of their broad discretion in deciding an application for a pardon or commutation of sentence.[5] Nevertheless, it was not the President alone who was responsible. His judicial colleagues at the Bureau were primarily responsible for developing and updating the Tribunal's rules,[6] and were consulted in these decisions. Thus, they too bore responsibility for establishing and maintaining good practice for this additional duty under their remit. Although deciding an application for early release is an unusual task for a judge, and not originally planned for them,[7] they were tasked with this decision. Additionally, they had a responsibility to the stakeholders in the region, under their Code of Conduct,[8] to be seen to be fair overall. Fundamentally, justice should be seen to be done and judges should do what is reasonable to achieve this. Justice does not end with the passing of the

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[1] The researcher took Beetham's broad framing and then applied the detailed understandings of legitimacy, its different elements, types and standards, when engaging with the literature on the ICTY and in exploring the practice of UER.
[2] D. Beetham, *The Legitimation of Power* (Macmillan International Higher Education, 2nd edition 2013). See Chapter 3.
[3] The extent to which the practice was done in accordance with established rules.
[4] The shared beliefs were explored by interviewing both stakeholders at The Hague (the decision-makers and those around them) and those subordinate to them, stakeholders in BiH. Express consent was read in-line with "consent" to "actions by relevant subordinates which confirm their acceptance or recognition of it [the rules and power of the state]". See D. Beetham 'Revisiting Legitimacy, Twenty Years On' in J. Tankebe and A. Liebling (eds.) *Legitimacy and Criminal Justice: An International Exploration* (Oxford University Press, 2013) at 20.
[5] Under Article 28 of the ICTY Statute.
[6] The Statute was written by the UNSG and his legal advisers, the RPE were written by the 11 judges elected to serve at the Tribunal and were published nine months later. First Annual Report. The Rules have been amended 49 times, see: http://www.icty.org/en/documents/rules-procedure-evidence
[7] See Chapter 5, the *Travaux Préparatoires*, s.5.2.2.
[8] Article 4(1) of the Code of Professional Conduct for the Judges of the Tribunal" adopted on 6 July 2016.
"Judges shall conduct themselves with probity and integrity in accordance with their judicial office, thereby enhancing public confidence in the judiciary".

sentence: the overall process of justice, from indictment to a perpetrator's return, forms part of the overall assessment of the Tribunal's legitimacy.[9] This thesis has shown (Chapter 8) that to obtain legitimacy for this practice, at a minimum, better procedural justice could have been undertaken without any detriment to perpetrators. For the immediate stakeholders (victim-witnesses), procedural justice was well within the Tribunal's capacity under the Practice Direction that guided the President to inform witnesses and any other relevant parties of the perpetrator's release.[10] It is, more generally, simply a matter of good practice under regional standards on the release of violent criminals.[11]

UER lacked sociological legitimacy, both in The Hague and in BiH. This sociological legitimacy deficit also arose, in one instance, from poor judicial practice, specifically, the President's consideration of the perpetrator's demonstration of rehabilitation.[12] Chapter 6 demonstrated a lack of rigour and at times, inappropriateness, which the President applied in his consideration of perpetrators' rehabilitation. Additionally, the chapter queried the applicability of good behaviour (such as adhering to prison rules and being polite to staff), and attendance at skills-workshops (woodwork and language) as evidence of rehabilitation. Perpetrators who ordered mass-killings, ethnic cleansing, committed torture, including rape and sexual violence, and those who turned a blind eye to this behaviour were considered well-practised in adhering to orders or complying with rules. The consideration of this factor was a source of disappointment for most in The Hague and in BiH. This was, however, only one of the factors the President was required to consider. Other factors had the potential to be considered legitimate, notably a perpetrator's substantial cooperation with the Prosecutor (see s.9.2). Further, as legitimacy is not a permanent state, just as it can be lost it can also be regained;[13] in fact, the institution appears to have recently sought to do so.[14]

Findings indicated that the ICTY's sociological legitimacy would have been improved if the Tribunal had communicated its early release determinations, both positive and negative, and their reasoning

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[9] C. Kress and G. Sluiter, 'Enforcement: Preliminary Remarks' in A. Cassese, P. Gaeta, J.R.W.D. Jones (eds.) *The Rome Statute of International Criminal Court: A Commentary* (Oxford University Press, 2002), at 1753 cited in B. Holá and J. van Wijk, 'Life after Conviction at International Criminal Tribunals: An Empirical Overview' (2014) *Journal of International Criminal Justice* 12: 109-132, at 110.

[10] Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the International Tribunal', paras. 11 and 12.

[11] Directive 2012/29/EU of the European Parliament and the Council of 25 October 2012, Article 6 (5) see Chapter 8, s.8.6.2.

[12] Rules and Procedure of Evidence, Rule 125.

[13] V. Popovski and N. Turner, 'Legality and Legitimacy in International Order' (2008) *United Nations University Policy Brief*, 5(4) see Chapter 3, s. 3.4.3.

[14] As the President has introduced Conditions upon release and has also been less inclined to grant early release. See Chapter 5, s.5.4.7 – s.5.4.8.

for early release to the region.[15] This finding points to the legitimacy standard of "legitimation through justification"[16] proposed by scholars who seek to advance international law. They have argued that it is incumbent on international legal institutions to "offer public justifications of at least the more controversial and consequential institutional policies".[17] In general, it is simply sensible practice to "preserve … legitimacy" where "disruptive effects" cannot be justified, to at least explain them.[18] Such disruptive events would include the UER of perpetrators of the most heinous crimes known to mankind. Further their UER frequently enabled their return to a hero's welcome, where they were to proudly proclaim to their supporters and the national media that they had duped the Tribunal in their statement of remorse, which had resulted in a lenient sentence and in the grant of early release.[19]

The thesis has also outlined the negative repercussions UER had in post-conflict BiH (Chapter 7, s.7.5). The possibility of early release had been envisaged at the time of the Tribunal's creation; this was in line with international human rights standards,[20] although not in the manner in which it developed. Further, international jurists made recommendations at this time and forewarned that repercussions, such as political instability, might arise if an early release was granted. They advised that the UNSC, not the Tribunal, have oversight of this decision. The UNSC had the expertise to ensure that an early release would not jeopardise the Tribunal's mandate to "contribute to the … maintenance of peace".[21] Thus, these jurists recognised the unique nature of atrocity perpetrators, especially those who had initiated the ethnic cleansing. They also recognised the different type of society to which they may return, whereby perpetrators may still have a following and where societal peace may remain fragile.[22]

Large portions of this thesis are dedicated to a key set of stakeholders in the international criminal justice system – the victims who have suffered.[23] It has argued that punishment for perpetrators of atrocity crimes fundamentally differs to that of ordinary perpetrators – based on the nature of the

[15] Finally, based on the fieldwork, this chapter has identified a shared belief that could still be put into practice to enhance the Mechanism's (and future *ad hoc* tribunals') legitimacy: substantial cooperation with the prosecutor post-conviction.
[16] See Chapter 3, s.3.5.5.
[17] A. Buchanan and R. Keohane, 'The Legitimacy of global governance institutions' in L. H. Meyer (ed.) *Legitimacy, Justice and Public International Law* (Cambridge University Press, 2009) (Cambridge University Press, 2009) at 49.
[18] M.C. Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) *The Academy of Management Review* 20(3) at 598. See Chapter 3, s.3.5.5.
[19] J. Subotić, 'The Cruelty of False Remorse: Biljana Plavšić at The Hague' (2012) *Southeastern Europe* 36(1) 39-59.
[20] W. Schabas, 'Sentencing by International Tribunals: A Human Rights Approach' (1997) *Duke Journal of Comparative and International Law* 7: 461-517.
[21] UNSCR 22 February 1993 and see Chapter 5, s. 5.2.1.
[22] See Chapter 5, s.5.2.2.
[23] N. Christie, 'Conflicts as Property' (1977) *The British Journal of Criminology* 17(1). See Chapter 3, s.3.6.3.

crimes – their mass victimisation and motive. Mass victimisation was not simply about the numbers killed but the motive; those killed represented a group.[24] Punishment is primarily symbolic: imprisonment signifies the moral condemnation of the crime and the criminal who committed it. As atrocity crimes are enabled by successful propaganda spreading distrust and/or hate of the other, punishing perpetrators is a symbolic validation of victims' worth. It sends the message that all human beings are of equal worth and nothing can justify the killing of the other based on differences of culture, ethnicity or race.[25] This message of moral condemnation of the crime and its motive also provides a norm projection – that is, that all humans are equal by virtue of shared humanity. This message was negated at UER and consequently the norm floundered.

The victims received a "second slap in the face"[26] when they witnessed perpetrators' sentences effectively having one-third "chopped off".[27] The lenient sentence was now compounded by UER - it was a further belittlement of their suffering.[28] Chapter 8 discussed how many of the practices experienced by victims during the Tribunal's lifetime as injustices – its plea-bargaining strategy,[29] the perceived lenient sentences,[30] the hotel package perpetrators received in the UNDU[31] and the lack of outreach[32] - were seen to be repeated by UER. The Tribunal had treated victims as passive stakeholders,[33] having justice brought to them, but in doing so had frequently overlooked them.

9.2. The Main Contributions of the Thesis

Broadly, the thesis contributes to the field of international criminal justice: how important practices of international criminal institutions develop, are justified and perceived by its key stakeholders.

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[24] *Kunarac et al*, Trial Chamber Judgement, 22 February 2001, para. 592, see Chapter 6, s.6.6.1.
[25] D. Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law' in S. Besson and J. Tasioulas (eds.) *The Philosophy of International Law* (Oxford University Press, 2010) at 576-577.
[26] A. Merrylees, 'Two-thirds and You're Out? The Practice of Early Release at the ICTY and the ICC, in Light of the Goals of International Criminal Justice' (2016) *Amsterdam Law Forum* 8(2): 69-76.
[27] Interview, Senior Staff Member, The Hague, 02/02/2017.
[28] S. Szoke-Burke, 'Avoiding Belittlement of Human Suffering A Retributivist Critique of ICTR Sentencing Practices' (2012) *Journal of International Criminal Justice* 10: 561-580.
[29] Noted by interviewees in BiH and see Chapter 4, s.4.4.1 and Chapter 8, s.8.2.
[30] Lenient sentences as an injustice to victims, see Chapter 4, s.4.4.2 and Chapter 8, s.8.4.2.
[31] Noted by two interviewees in BiH - Interview, NGO Director, Sarajevo, midday 06/11/2017 and Prosecutor, Federation, 21/11/2017. These two interviewees referred to prison conditions as 'hotel packages' and 'hotel service', respectively, see K. King and J.D Meernik 'Assessing the Impact of the ICTY: Balancing International with Local Interests while doing Justice' in *The Legacy of the ICTY* (eds.) B. Swart, A. Zahar and G. Sluiter (Oxford University Press, 2011) cited by R. Mulgrew, *Towards the Development of an International Penal System* (Cambridge University Press, 2013) 229.
[32] See Chapter 4, s.4.3.2.
[33] See Chapter 4, s.4.3.1.

The thesis expands the field of knowledge of the ICTY in its enforcement of sentences and contributes to the small amount of literature which has explored the normative legitimacy of UER. Moreover, it adds to understanding enforcement's normative legitimacy and has extended the legitimacy frame into an exploration of enforcement's sociological legitimacy. It does so on the basis that justice doesn't end with the sentence, and the researcher is not alone in this understanding. Sentence enforcement, its "nature … and application in practice must form part of a complete judgment about the legitimacy of this system".[34] Kress and Sluiter's argument that enforcement forms "*part* of a complete judgment"[35] implies that it cannot be understood in isolation. Firstly, given that this study forms *part* of an overall legitimacy assessment, it was important to understand the existing literature which has evaluated legitimacy - that is, both its normative legitimacy as examined in scholarly assessments of the ICTY's penal practices, and engagement with its stakeholders, its sociological legitimacy (Chapter 4). The thesis has explained that the injustice experienced by victims at UER was perceived as a continuation of the injustices experienced by the Tribunal's sentencing practices, notably plea bargaining and lenient sentences, as well as a sense of remoteness from the Tribunal which appeared to focus on perpetrators' well-being over their suffering (Chapter 8, s.8.2).

Secondly, "*part of"* implies that the larger context should be recognised. Just as it was recognised that enforcement had a preceding practice, it is recognised that enforcement is surrounded by other factors. Through analysis of the reasons given by interviewees as to why they perceived UER as illegitimate or legitimate, this thesis has contributed both directly and sometimes implicitly, to the studies examining the sociological legitimacy of the ICTY in post-conflict BiH. Stakeholders' reasoning clarified why these perceptions were held, or at the very least, what these stakeholders said these perceptions were. Interviewees spoke of the context within which their perceptions of legitimacy are shaped (Chapter 8, s.8.7). In the BiH criminal justice system, the prosecution of war criminals is perceived as lacking legitimacy on a bigger scale; it has a greater lack of transparency, whereby names of perpetrators are removed from the indictment; and lenient sentences, whereby perpetrators of rape, for example, can pay a fine in lieu of a prison sentence.[36]

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[34] C. Kress and G. Sluiter, 'Enforcement: Preliminary Remarks', in A. Cassese, P. Gaeta, J.R.W.D. Jones (eds.) *The Rome Statute of International Criminal Court: A Commentary (*Oxford University Press, 2002), 1751–1756 at 1753, cited in B. Holá and J. van Wijk 'Life after Conviction at International Criminal Tribunals An Empirical Overview' *Journal of International Criminal Justice* (2014) 12: 109-132 at 110.

[35] Emphasis added.

[36] See Chapter 8, s. 8.7.1.

The research does not claim to be representative of the general BiH population perceptions of UER but it does provide an in-depth understanding of a significant range of stakeholders' perceptions. Judges and lawyers were interviewed, as were Victims' Associations and NGOs and CSOs working with victims, and IGO representatives who had similarly worked with victims or on post-conflict or criminal justice policy. By taking the actor-orientated approach,[37] recruiting a broad selection of stakeholders, the research provides a rich understanding as to what particular aspects of UER were lacking legitimacy and why these views were held.

The qualitative research, namely, interviews with Tribunal stakeholders with direct knowledge of the decision-making process, has enabled the thesis to provide explanations as to why this practice occurred in the way that it did. It has confirmed Choi's argument that the practice was foreseen as an exceptional grant of clemency but became a standard. However, counter to Choi's assertion, this practice resulted not from the misapplication of the domestic system of parole to the international setting but from a combination of factors. First, the perceived pragmatic restraints (relying on states to enforce the sentences);[38] second, remoteness from the region and subsequent lack of awareness of the repercussions of UER;[39] third, the Presidents' and judicial colleagues' personal philosophy – such as: ensuring they were independent of politics,[40] giving perpetrators a second chance,[41] and a sense of fatalism that victims will never be satisfied with criminal justice outcomes.[42] These findings confirm scholars' critiques of the Tribunal's exercise of power prior to UER. For example, in relation to pragmatic challenges dominating, the Tribunal was seen to act as if it were at the mercy of states.[43] Second, were the judges' focus on developing international criminal law and their general refusal to recognise that the Tribunal's judgment had a broader societal impact, and that politics did play a role in that society.[44] This thesis argues that if it were not for the judges themselves to engage with this political element of society then it should have been the task of Outreach – but the judges nevertheless needed to clarify their reasoning with Outreach. This also spoke to a lack of internal communication – as noted in Chapter 8, whereby the staff member noted, in relation to redactions from UER decisions, that this "is a judicial matter so leave it up to the judge. I can't really comment on that".[45] Her attitude ran counter to the judge who did not perceive their role as explaining anything to the region; "we are a court of justice, many of the decisions are legal and the public will

[37] See Chapter 2, s.2.4.1.
[38] See Chapter 5, s.5.4.5.
[39] See Chapter 6, s.6.3.1.
[40] Chapter 6, s.6.4.2.
[41] Chapter 6, s.6.4.2.
[42] Chapter 8, s.8.4.
[43] See Chapter 4, s.4.2.2.
[44] See Chapter 4, s.4.3.2.
[45] Interview, Staff Member, The Hague, 27/01/2017. See Chapter 8, s.8.4.3.

never understand it in any case".[46] This judicial attitude is connected to the third factor that this thesis has also found, that judicial philosophy played a role in shaping practices.[47] Some philosophies[48] were perpetrator-focused, whereby perpetrators' human rights and their right to rehabilitation are accorded priority which led to the societal context being overlooked. Other philosophies were more fatalistic, whereby victims are perceived as inevitably dissatisfied with criminal justice outcomes, or due to mass victimisation, whereby the criminal justice process had already excluded other victims, that it would be unfair to actively engage those who had the good fortune to be recognised as victims.

This thesis is not simply a critical assessment of the Tribunal, and it is not a moral critique of the Tribunal's UER. In addition to exploring its normative legitimacy (the empirical legal analysis of the decisions) it explores the extent to which UER holds sociological legitimacy amongst groups of stakeholders, and discusses the elements whereby legitimacy is perceived to be lacking. Many of these legitimacy deficits may arise from beliefs which are based on personal morals and this thesis has examined these beliefs.

Although the focus is on the past practice, this thesis' findings have made forward-looking recommendations.[49] Although morals are not universal, this thesis has identified shared beliefs as to the legitimacy deficits of UER and has explored them. These legitimacy deficits are worthy of reflection. Future ICTs and the International Criminal Court, which dispense justice from afar, and even domestic courts which grant early release, may do well to reflect on these legitimacy deficits and adapt accordingly to maintain or regain legitimacy as they continue with what is a controversial practice. One easy step would be better communication as to the reason for UER. Given the gravity and nature of the crime, it was a shock to most (with the exception of judges) that UER was granted to these perpetrators. Stakeholders in BiH were frustrated by the lack of justification for UER.[50] Those who had received no explanation from The Tribunal were most aggrieved.

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[46] Interview, Judge, The Hague, morning of 30/01/2017. See Chapter 8, s.8.4.3.
[47] See Chapter 5, s.5.4.3 for example President Meron, explicitly stating his decision to consider a guilty plea for a second time, due to the efficient administration of justice. And see M. Scheinin, H. Krunke and M. Aksenova, *Judges as Guardians of Constitutionalism and Human Rights*, (Edward Elgar Publishing, 2016).
[48] See Chapter 8, s.8.5.
[49] G. Schaffer, 'International Legal Theory: International Law and its Methodology: The New Legal Realist Approach to International Law' (2015) *Leiden Journal of International Law* 28: 189 cited in M. Aksenova, Elies van Sliedregt and Stephan Parmentier (eds.) *Breaking Cycles of Mass Atrocities: Criminological and Socio-Legal Approaches in International Criminal Law,* (2019, Hart Publishing, Oxford) 25.
[50] See Chapter 8, s.8.2 and s.8.6.3.

Additionally, analysis of the interviews has identified some possibilities that could justify an early release. Pertinent to note here is that these justifications are based on the assumption that early release is never unconditional. The argument is that, fundamentally, perpetrators must atone for their crimes. Atonement can come in many forms: an apology, testimony and provision of information. A genuine apology being offered acts as a validation for the victims' worth. Providing testimony against "brothers in blood"[51] could hold symbolic value in a country whereby crimes are perceived as justifiable by large segments of the perpetrators' ethnic-political group; or, pragmatically, testimony could assist in bringing other criminals to justice. When they have information of where missing bodies are, they should cooperate and thus provide a tangible benefit to victims who can bury their dead.

Apologies may not be accepted; that is the victims' prerogative.[52] Some may consider it offensive that such perpetrators are offered the opportunity to apologise but, arguably, it is no less offensive than them gloating at their lack of remorse, boasting that they would "do it all again".[53] Further, when apologies are public this means they are audible not only for victims but for post-conflict society, where war criminals often remain heroes for many[54] and this, in turn, may promote reflections on past atrocities.[55]

Substantial cooperation with the Prosecutor was perceived as an act which could justify an early release for many because it would lead to other convictions, thus affirming Orentlicher's empirical research findings that victims largely wanted retributive justice.[56] A principal finding in this thesis was that justice is relative: interviewees frequently referenced the injustices faced by the domestic criminal courts sentencing war crimes to their sense of injustice at the Tribunal's UER; fundamentally, many interviewees believed that without the Tribunal no perpetrator would have been brought to justice.[57]

This finding, that some justice is better than none, does not call for complacency, rather that criminal justice can always do better for the society it is meant to serve. Many people wanted

[51] Interview, NGO, RS, 24/11/2017.
[52] See Chapter 6, s.6.6.2.
[53] V. Šljivančanin cited in B. Holá, J. van Wijk, F. Constantini, and A. Korhonnen, 'Does Remorse Count? ICTY Convicts' Reflections on Their Crimes in Early Release Decisions' (2018) *International Criminal Justice Review* 28(4) 349-371 at 360.
[54] See Chapter 7, s.7.5.2-7.5.3.
[55] L. Payne, *Unsettling Accounts: Neither Truth nor Reconciliation in Confessions of State Violence* (Duke University Press, 2008,) 34. See Chapter 6, s.6.7.
[56] D. Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (Open Society Justice Institutive and ICTJ, 2010) at 56.
[57] Chapter 8, s. 8.7.2.

criminal justice for perpetrators of atrocity crimes; they were pleased that it was done, but it still could have been done better. As argued by one interviewee "just because it's difficult it doesn't mean you don't try".[58] Alongside this, the thesis' reiterates here that ICTs should not raise expectations unrealistically,[59] or purport to achieve what they cannot obtain or are mandated to do.[60] Fundamentally, international jurists should do their jobs to the best of their ability[61] yet also practice some "legal humility".[62]

9.3. Limitations of the Research

The thesis' argument that UER lacked both normative and sociological legitimacy is based on the researcher's data collection and analysis. Chapter 2, detailed the methods used in data collection and analysis and has done so transparently. It is believed that research can never be truly objective.[63] This is one reason why the interviewees' words have been used as far as possible, and the interpretation of these detailed. The reader may not arrive at the same interpretation but, in detailing the analysis, it is hoped that the reader can see why this interpretation is taken.

One limitation of this research is that only one former Tribunal President, the ultimate decision-maker, was interviewed, and he was reluctant to discuss details. This limitation reveals two things: first the constraint of this research, that the other four Presidents who had granted release are not represented here.[64] Second, that qualitative analysis may only capture a small amount of what the interviewee actually perceives. The interviewee can say as much or as little as he wishes. However, semi-structured interviews, to an extent, provide flexibility to engage with unforthcoming interviewees. Further questions can be probed, other information provided for the interviewee to consider and reflect on rather than what has been questioned directly.

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[58] Interview, NGO, Sarajevo, BiH, 01/12/2019.
[59] U. Orth, 'Secondary Victimisation of Crime Victims by Criminal Proceedings' (2002) *Social Justice Research* 15(4): 313-325 (generally); J. Subotić, 'Legitimacy, Scope and Conflicting Claims of the ICTY: in the Aftermath of Gotovina, Haradinaj and Perisic' (2006) *Journal of Human Rights* 13: 170-185, 172 (specifically regarding the ICTY); and see Chapter 4, s.4.3.1.
[60] Bringing justice to victims, giving them a voice and establishing facts. See Achievement section of ICTY website: https://www.icty.org/en/about/tribunal/achievements
[61] ICTY, Rules and Procedure of Evidence, Section 1: The Judges, Rule 14(A) – 'Before taking up duties each Judge shall make the following solemn declaration: "I solemnly declare that I will perform my duties and exercise my powers as a Judge of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 honourably, faithfully, impartially and conscientiously".
[62] K. McEvoy 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice' (2007) *Journal of Law and Society* 34(4) 411-440, at 411, see Chapter 4, s.4.3.1 and. J. Subotić, 'The Cruelty of False Remorse: Biljana Plavšić at The Hague' (2012) *Southeastern Europe* 36 (1) at 57 specifically, in relation to the ICTY and ICTs.
[63] See Chapter 2, s.2.5.
[64] All Presidents, Presidents Kirk-McDonald, Jorda, Pocar and Meron were invited for an interview. With the expectation of Judge Jorda, all effectively declined. Unfortunately, due to personal circumstances Judge Jorda was not able to be interviewed at the last moment. However, he kindly provided details of another Tribunal judge who agreed to be interviewed, September 2018.

A limitation of the qualitative research in BiH was the lack of interviewees who were, at least openly, anti-ICTY, who did not perceive the ICTY as holding legitimacy.[65] Other interviewees, although often critical of the Tribunal's practice, did not perceive the Tribunal as an illegitimate institution. Another limitation may be that a number of nuances were lost in translation. This could be the case for the 25 interviews[66] which required interpretation as well as the interviews which were conducted with interviewees whose second language was English.

9.4. Alternative Approaches to this Understanding UER

One set of stakeholders at the ICTY whose voice is absent from this thesis, are the perpetrators.[67] UER is about them, and the research is about stakeholders' perceptions of perpetrators and their treatment in the process. Fundamentally, however, the motivation for the thesis was an interest in victims and post-conflict communities' perceptions of UER, their assessments of the Tribunal's legitimacy and if UER had repercussions in their lives. Further, scholars are exploring the position of the perpetrators, their imprisonment,[68] their rehabilitation[69] and their return.[70]

A more legalistic approach to understanding victims in the grant of UER could have been undertaken: examining the rights of victims in the criminal justice process, examining the extent to which these could be advanced in the post-sentencing phase. There is a significant body of soft law, the UN "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power" 1985 and the Council of Europe's Recommendation on "The Position of the Victim in the Framework of Criminal Law and Procedure" 1985, which recommends states to take a more victim-oriented approach to criminal justice, which was touched upon in Chapter 3 and Chapter 8, s.8.6.2. However,

[65] Only one interviewee expressly acknowledged his disregard for the ICTY. Although others may have shared a similar view this was not asked nor disclosed. Interviewees were not asked directly if they perceived the Tribunal as legitimate, rather if the grant of UER had affected their perception of the overall legitimacy. The focus of the thesis was not about the Tribunal's overall legitimacy but concerned whether the practice was perceived as lacking legitimacy and if it had an impact on perceptions of the Tribunal's legitimacy.

[66] 24 interviews in BiH were conducted with an interpreter. One interview was conducted with a Tribunal judge with an interpreter, in September 2018.

[67] Only the case of perpetrator, Esad Landžo, is raised, his remorse and search for victims to apologise to: see Chapter 6, s.6.6.2.

[68] M. Weinberg De Roca and C. Rassi,'Sentencing and Incarceration in the Ad Hoc Tribunals' (2008) *Stanford Journal of International Law* 44(1); R. Mulgrew, *Towards the Development of the International Penal System* (Cambridge University Press, 2014); see Chapter 4, s. 4.5.2.

[69] See Chapter 4, s.4.5.2.

[70] See Special Issue: (December 2018) *International Criminal Justice Review* 28(4): ICTY Celebrities: War Criminals Coming Home.

understanding victims' perceptions of UER and its impact is important so as to understand the reality of victims' justice rather than the black letter law.

Another approach would be a comparative study. There were two possible options for comparisons, one examining early release for perpetrators of hate crimes at the national level, or one examining early release at other ICTs. The case of domestic practice was touched upon, the EU Directive in particular which found that perpetrators of serious crimes are generally not granted UER and victims are often provided with information on release.[71] However, the societal context is fundamentally different. Post-conflict countries, and BiH in particular, are often deeply divided and thus "tend to have sharply different perceptions regarding the … dynamics of the conflict … [and an] inability of social groups to acknowledge criminal responsibility of their co-nationals",[72] to relativise crimes[73] (our group had the most victims) or for groups to counter their group's crimes with the "*tu quoque*" defense[74] - that the other parties to the conflict committed similar atrocities or that they were the ones who commenced the atrocity.[75]

The comparative study approach was considered, the UER of perpetrators by the ICTY and by its sister Tribunal, the ICTR. However, the two cases are distinct. First, the ICTY has a significant number of UER (54 of the 90 convicted); whereas only 12 of 62 ICTR perpetrators have been granted UER,[76] one in 2019 was granted conditional release.[77] Second, the nature of perpetrators' return differs. In Rwanda, the Tutsi government is in power, which means that perpetrators, Hutus, do not return.[78] Many remain at the UN "safe house" in Arusha and others have remained in the enforcement states of their sentences.[79]

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[71] See Chapter 8, s.8.6.2.
[72] M. Tripkovic, 'Not in Our Name' in M. Aksenova, E. van Sliedregt and S. Parmentier (eds.) *Breaking Cycles of Mass Atrocities: Criminological and Socio-Legal Approaches in International Criminal Law* (Hart, 2019) at 177.
[73] D. Orentlicher, *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia* (Oxford University Press, 2018) at 264-265, "BCHR surveys capture stark differences in the responses of citizens in predominately Serb, Croat, and Bosniak regions, respectively, to questions about relative victimization and responsibility for war crimes" at 264.
[74] R.A. Wilson, *Writing History in International Criminal Trials* (Cambridge University Press, 2011) at 155.
[75] Decision of the Good Character of the Accused and the Defence of *Tu Quoque*, *Prosecutor v. Zoran Kupreškić* et al, IT-95-16-t, 17 February 1999, cited in R.A. Wilson, *Writing History in International Criminal Trials* (Cambridge University Press, 2011) at 155-156.
[76] G. Ruggiu, M. Bagaragaza, T. Muvunyi, J. Rugambarara, P. Bisengimana, O. Serushago, O. Ruzindana, I. Sagahutu, G. Ntakirutimana, F. Nahimana, A. Nteziryayo, E. Rukundo and see https://unictr.irmct.org/en/tribunal
[77] A. Simba, released on condition, 7 January 2019, see: https://www.justiceinfo.net/en/tribunals/ictr/41861-early-release-of-ictr-convicts-the-practice-beyond-the-outrage.html [accessed 10/12/2019].
[78] B. Holá and J. van Wijk, 'Life after Conviction at International Criminal Tribunals: An Empirical Overview' (2014) *Journal of International Criminal Justice* 12: 109-132, at 131.
[79] B. Holá and J. van Wijk, 'Life after Conviction at International Criminal Tribunals: An Empirical Overview' at 130.

9.5. The Research's Significance and Broader Relevance to International Criminal Justice

The findings of this thesis, in addition to specific proposals (s.9.2), provide broader reflections for international criminal justice. Paying heed to these reflections may benefit other international criminal tribunals, or indeed any criminal justice system punishing atrocity crimes, if they wish to be perceived as legitimate by those whose lives they affect, post-conflict communities.[80] In addition to demonstrating a normative legitimacy deficit, the research's findings from BiH stakeholders' interviews provide unique insights into why UER lacked sociological legitimacy. There are three main reasons and three subsequent recommendations.

First, atrocity crimes are fundamentally different to ordinary crimes due to their discriminatory motive or perpetration within a context of group-based hatred. Atrocity crimes happen in a context and in post-conflict society elements of that context may be ongoing.[81] In relation to UER for perpetrators of atrocity crimes this means that, when they return to the same post-conflict community, their social reintegration is radically different to that of perpetrators of ordinary crimes. As Chapters 6 and 7 illustrated, this belief was shared by the majority of stakeholders interviewed, insiders at The Hague and outsiders in BiH. One of the reasons why the Tribunal's Presidents' early release decisions lacked legitimacy was that this fundamental difference was not, until recently,[82] accounted for in their consideration of rehabilitation.

It follows from this that any institution considering a grant of early release to a perpetrator who plans to return to a post-conflict society should take into account that society, and the perpetrator's willingness to peacefully and respectfully return to that society. This is not an unreasonable proposal. It is in line with the second element of the notion of rehabilitation under international human rights law, the perpetrator's "social reformation".[83] Although it may not be the normal role of a judge, where they are tasked with this responsibility, they should fulfill it to the best of their ability. This recommendation appears to have been adopted by the current Tribunal President.[84]

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[80] These insights may be pertinent to the punishment and its premature ending and thus are of broader relevance for any institution (international or local) which punish atrocity crimes and consider early release from that punishment.
[81] Detailed in Chapter 7.
[82] *Prosecutor v. Miroslav Bralo*, Public Redacted Version, Decision on the Early Release of Miroslav Bralo, 31 December 2019, paras. 38 and 39.
[83] Article 10(3) ICCPR.
[84] Prosecutor v. Miroslav Bralo, Public Redacted Version, Decision on the Early Release of Miroslav Bralo, 31 December 2019, whereby UNMICT President Agius noted that, "in my opinion, it is not appropriate to look at the rehabilitation of perpetrators of genocide, crimes against humanity or war crimes through the exact paradigm as rehabilitation of perpetrators of domestic or ordinary crimes", at para. 38.

Future Presidents, and other tribunals and courts which consider early release for atrocity perpetrators, could possibly manage their legitimacy in continuing this practice.

Second, punishment of perpetrators of atrocity crimes (mass victimisation motivated by or within the context of group-based hatred) symbolises the condemnation of the act of hatred and is simultaneously a recognition of the dignity of the victims. Consequently, UER was widely perceived of as a negation of the expression of condemnation and vindication of the victims.[85]

With this finding in mind, early release (unconditional or not) of perpetrators should be explained to stakeholders in post-conflict societies to counter these misunderstandings.[86] This recommendation accords with the legitimacy standard of legitimation through justification. Although not everyone may agree with the reasoning, notifying and explaining the decision would accord respect to the victims, which this thesis argues should not be discounted at the early release stage. Paying respect to victims is also in line with UN and EU Standards on the Rights of Victims.[87]

Third, primarily due to its own rhetoric, a majority of stakeholders, especially victims, in BiH expected more from the ICTY than its "sole purpose" of bringing perpetrators to justice – which was its core mandate under the UNSCR. This is important to emphasise as international criminal justice is fundamentally about criminal accountability, despite some aspirations, expressed by scholars and others, of bringing voice to victims, providing an authoritative truth or being a means of reconciliation.[88] Findings from BiH showed that many victims wanted criminal justice for the crimes, and the fact that some justice was done meant that UER did not delegitimise the Tribunal overall. Nevertheless many, especially victims, were deeply disappointed and one factor was that the Tribunal had promised more than it could achieve.

Going forward, therefore, international criminal tribunals and courts should not purport to do more than they are mandated, or able to do. They should focus on fulfilling, to the best of their abilities, their core mandate: holding perpetrators to account through a fair trial. When unrealistic promises are made, they are heard and this can lead to disappointment for those who have already suffered, the victims.

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[85] Chapter 7.
[86] Again, President Agius adopted this practice as he denied early release to Bralo, stating that, "I consider that it is in the interest of transparency to identify some of the principles that guide my reasoning", Decision on the Early Release of Miroslav Bralo, 31 December 2019, at para. 38.
[87] See Chapter 3 and Chapter 8, s.8.5.1.
[88] See Chapter 4.

These three recommendations are reasonable and in accordance with international human rights standards. Moreover, they are straightforward; they could be followed by practitioners in the field of international criminal justice simply by bearing in mind the old truism – that justice should be seen to be done. Keeping this in mind, practitioners would be more aware that their actions have consequences for the people whom justice is meant to serve and would, therefore, consider them in this final dispensation of justice, that is, the grant, where appropriate, of atrocity perpetrators' early release from imprisonment.

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Prosecutor v. Erdemović, Judgement, 29 November 1996, Case No IT-96-22-T

Prosecutor v. Furundžija, Judgement, 10 December 1998, Case No. IT-95-17/1-T

Prosecutor v. Goran Jelisić, Judgement ,14 December 1999, Case No. IT-95-10-T

Prosecutor v. M. Jokić, Sentencing Judgement, 18 March 2004, Case No. IT-01-42/1-S

Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Judgement, 22 February 2001, Case No. IT-96-23-T & IT-96-23/1-T

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Prosecutor v. Dragan Nikolić, Sentencing Judgement, 18 December 2003, Case No. IT-94-2-S

Prosecutor v. Momir Nikolić, Sentencing Judgement, 2 December 2003, Case No. IT-02-60/1-S

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Prosecutor v. Zelenović, Sentencing Judgement, 4 April 2007, Case No. IT-96-23/2-S

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Annex I: Early Release Decisions of the President of the ICTY (as of 2012, the UNMICT)

1999

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2001

Z. Aleksovski, Order of the President for the Early Release of Zlatko Aleksovski, 14 November 2001. [GRANTED]

D. Kolundžija, Order of the President for the Early Release of Dragan Kolundžija, 5 December 2001. [GRANTED]

2002

M. Kos, Order of the President for the Early Release of Milojica Kos, 30 July 2002. [GRANTED]

M. Krnojelac, Decision of the President on the Application for a Pardon or Commutation of Sentence of Milorad Krnojelac, 9 July 2009. [GRANTED]

2003

D. Došen, Order of the President on the Early Release of Damir Došen, 28 February 2003. [GRANTED]

S. Todorović, Decision on Pardon or Commutation of Sentence, S. Todorović, 22 June 2003. [GRANTED]

M. Simić, Order of the President on the Application for the Early Release of Milan Simić, 27 October 2003. [GRANTED]

Z. Mucić, Order of the President in Response to Zdravko Mucić's Request for Early Release, 9 July 2003. [GRANTED]

2004

S. Zarić, Order of the President on the Application for the Early Release of Simo Zarić, 21 January 2004. [GRANTED]

A. Furundžija, Order of the President on the Application for the Early Release of Anto Furundžija 29 July 2004. [GRANTED]

T. Blaškić, Order of the President on the Application for the Early Release of Tihomir Blaškić, 29 July 2004. [GRANTED]

M. Tadić, Decision of the President on the Application for Pardon or Commutation of Sentence of Miroslav Tadić, 24 June 2004. [GRANTED]

2005

M. Kvočka, Decision of the President on the Application for the Early Release of Miroslav Kvočka, 30 March 2005. [GRANTED]

2006

D. Josipović, Decision of the President on the Application for Pardon or Commutation of Sentence of D. Josipović, 30 January 2006. [GRANTED]

A. Kubura, Decision of the President on Amir Kubura's Request for Early Release, 11 April 2006. [GRANTED]

E. Landžo, Order of the President on Commutation of Sentence, 13 April 2006. [GRANTED]

2008

Z. Vuković, Decision of the President on Commutation of Sentence, 11 March 2008. [GRANTED]

D. Tadić, Decision of the President on the Application for Pardon or Commutation of Sentence of Duško Tadić, 17 July 2008. [GRANTED]

H. Delić, Decision on Hazim Delić's Motion for Commutation of Sentence, 24 June 2008. [GRANTED]

M. Jokić, Decision of the President on Request for Early Release, 1 September 2008. [GRANTED]

P. Banović, Decision of the President on Commutation of Sentence, 3 September 2008. [GRANTED]

2009

P. Strugar, Decision of the President on the Application for Pardon or Commutation of Sentence of Pavle Strugar, 16 January 2009. [GRANTED]

V. Šantić, Decision of the President on the Application for Pardon or Commutation of Sentence of V. Šantić, 16 February 2009. [GRANTED]

M. Krnojelac, Decision of the President on the Application for Pardon or Commutation of Sentence, 9 July 2009. [GRANTED]

B. Plavšić, Decision of the President on the Application for Pardon or Commutation of Sentence of Biljana Plavšić, 14 September 2009. [GRANTED]

2010

M. Vasiljević, Public Redacted Version of Decision of the President on the Application for Pardon or Commutation of Sentence of Mitar Vasiljević, 12 March 2010. [GRANTED]

D. Jokić, Public Redacted Version of Decision of the President on the Application for Pardon or Commutation of Sentence of Dragan Jokić, 8 December 2010. [GRANTED]

M. Gvero, Decision of the President on Early Release of Milan Gvero, 28 June 2010. [GRANTED]

Z. Žigić, Decision of the President on Early Release of Zoran Žigić, 8 November 2010. [GRANTED]

2011

B. Simić, Decision of the President on the Early Release of Blagoje Simić, 15 February 2011. [GRANTED]

D. Sikirica, Decision of the President on Early Release of Duško Sikirica, 21 June 2011. [GRANTED]

V. Šljivančanin, Decision of the President on Early Release of Veselin Šljivančanin, 5 July 2011. [GRANTED]

I. Rajić, Decision of the President on Early Release of Ivica Rajić, 22 August 2011. [GRANTED]

D. Obrenović, Decision of the President on the Early Release of Dragan Obrenović, 21 September 2011. [GRANTED]

V. Martinović, Decision of the President on Early Release of Vinko Martinović, 16 December 2011. [GRANTED]

2012

V. Blagojević, Decision of the President on the Application for Early Release of Vidoje Blagojević, 3 February 2012. [GRANTED]

H. Bala, Public Redacted Decision of the President on the Early Release of Haradin Bala, 28 June 2012, 9 January 2013. [GRANTED]

D. Zelenović, Early Release Decision, 24 June 2008, 30 November 2012 [DENIED]

M. Naletilić, Public Redacted Version of the 29 November 2012 Decision the President on the Early Release of Mladen Naletilić, 26 March 2013. [GRANTED]

2013

M. Radić, Public Redacted Version of the 13 February 2013 of Decision the President on the Early Release of Mlađo Radić, 9 January 2013. [GRANTED]

J. Tarčulovski, Decision the President on the Early Release of Johan Tarčulovski, 8 April 2013. [GRANTED]

M. Krajišnik, Decision the President on the Early Release of Momčilo Krajišnik, 2 July 2013. [GRANTED]

R. Kovač, Public Redacted Version of the 27 March 2013 of Decision the President on the Early Release of Radomir Kovač, 3 July 2013. [GRANTED]

D. Ojdanić, Public Redacted Version of the 10 July 2013 of Decision the President on the Early Release of Dragoljub Ojdanić, 29 August 2013. [GRANTED]

D. Mrđa, Decision the President on the Early Release of Darko Mrđa, 18 December 2013. [GRANTED]

2014

Dragan Nikolić, Decision the President on the Early Release of Dragan Nikolić, 16 January 2014. [GRANTED]

R. Češić, Public Redacted Version of the 30 April 2014 Decision of the President on the Early Release of on the Early Release of Ranko Češić, 28 May 2014. [GRANTED]

2015

V. Pandurević, Public Redacted Version of the 9 April 2015 Decision of the President on the Early Release of Vinko Pandurević, 10 April 2015. [GRANTED]

N. Šainović, Public Redacted Version of the 10 July 2015 Decision of the President on the Early Release of Nikola Šainović, 27 August 2015. [GRANTED]

Drago Nikolić, 20 July 2015 Decision of the President on the Application for Early Release or other Relief of Drago Nikolić', made public 13 October 2015. [GRANTED]

V. Lazarević, Public Redacted Version of the 7 September 2015 Decision of the President on the Early Release of Vladimir Lazarević, 3 December 2015. [GRANTED]

D. Zelenović, Public Redacted Version of the 28 August 2015 Decision of the President on the Early Release of Dragan Zelenović, 15 September 2015. [GRANTED]

2016

L. Borovčanin, Public Redacted Version of 14 July 2016 Decision of the President on the Early Release of Ljubomir Borovčanin, 2 August 2016. [GRANTED]

2017

D. Kunarac, Decision of the President on the Early Release of Dragoljub Kunarac, 2 February 2017 [DENIED]

L. Beara, Public Redacted Version of the 7 February 2017 Decision of the President on the Early Release of Ljubiša Beara, 16 June 2017. [GRANTED]

2018

B. Pušić, Public Redacted Version of the 20 April 2018 Decision of the President on the Early Release of Berislav Pušić, made public 24 April 2018. [GRANTED]

R. Miletić, Decision of the President on the Early Release of Radivoje Miletić, 23 October 2018 [DENIED]

2019

V. Ćorić, Further Redacted Version of the Decision of the President on the Early Release of Valentin Early Release Decision of Ćorić and Related Motions, 16 January 2019 [GRANTED CONDITIONAL RELEASE]

Miroslav Bralo, Decision on the Early Release of Miroslav Bralo, 31 December 2019 [DENIED]

Annex II: Schedule of Interviews

ICTY and UNMICT: Including ICTY President Judge Agius, Judge Flügge, Judge Moloto and Judge Orie.[1]

Interview	Interviewee	Location	Date
1	Judge	The Hague	23/01/2017
2	Staff Member, The Registry	The Hague	23/01/2017
3	Senior Staff Member, The Registry	The Hague	24/01/2017
4	Staff Member, The Registry	The Hague	24/01/2017
5	Defence Counsel, Mr. Peter Robinson	The Hague	25/01/2017
6	Judge, Former President of the ICTY	The Hague	25/01/2017
7	Judge	The Hague	26/01/2017
8	Staff Member, The Registry	The Hague	27/01/2017
9	Staff Member, The Registry	The Hague	31/01/2017
10	Judge	The Hague	Morning 30/01/2017
11	Judge	The Hague	Afternoon 30/01/2017
12	Judge	The Hague	01/02/2017

[1] As two judges did not wish to be named their anonymity has been maintained by not identifying any interviewee by name.

Interview	Interviewee	Location	Date
13	Senior Staff Member, Office of the Prosecutor	The Hague	02/02/2017
14	Senior Staff Member, President's Office	The Hague	02/02/2017
15	Judge	The Hague	03/02/2017
16	Staff Member, President's Office	The Hague	03/02/2017
17	Staff Member, The Registry	The Hague	26/01/2017
18	Judge Antonetti	Paris	23/09/2018

BiH – 51 interviews[2]

- Including the following CSOs and NGOs: Association for Transitional Justice, Accountability and Remembrance, Sarajevo; *Austra Nula*, Banja Luka; Centre for Democracy and Transitional Justice, Sarajevo; Balkans Investigating Reporting Network, Sarajevo; Center for Investigative Reporting, Sarajevo; Republic Organization of Families of Captured and Killed Soldiers and Missing Civilians, Banja Luka; Research and Documentation Center, Sarajevo; *Snaga Žene,* Sarajevo; Society for Threatened People, Sarajevo; *Sehera,* Goražde; *Suza*, Brčko *Vasa Prava,* Sarajevo; Victims and Witnesses of Genocide, Sarajevo; *Vive Žene*, Tuzla; TRIAL International; and Youth Initiative for Human Rights, Sarajevo.

- Including the following IGOs: the Council of Europe, the European Union and the United Nations Development Programme.

- Including one staff member of the ICTY.

[2] As not all interviewees wished to be named their anonymity has been maintained by not identifying any interviewee by name.

Interview	Interviewee(s)	Location, BiH	Date
1	NGO Representative	Sarajevo	16/10/2017
2	Judges, War Crimes Chamber, Bosnian State Court (Two judges)	Sarajevo	18/10/2017
3	NGO, Staff Member	Sarajevo	27/10/2017
4	NGO, Staff Member	Sarajevo	02/11/2017
5	Ministry of Justice	Sarajevo	03/11/2017
6	Judge, formerly served at War Crimes Chamber	Sarajevo	03/11/2017
7	Defence Lawyer	Sarajevo	03/11/2017
8	Victims' Association, Director and Staff Member	Sarajevo	Morning, 06/11/2017
9	NGO, Director	Sarajevo	Midday, 06/11/2017
10	NGO, Director	Sarajevo	Afternoon, 06/11/2017
11	NGO, Director	Sarajevo	07/11/2017
12	ICTY, Staff Member	Sarajevo	08/11/20197
13	Prosecutor	Zenica	09/11/2017

Interview	Interviewee(s)	Location, BiH	Date
14	Chief Prosecutor	Brčko	13/11/2017
15	Prosecutor	Brčko	13/11/2017
16	Judges (3)	Brčko	13/11/2017
17	Judge and Member of Parole Commission	Brčko	13/11/2017
18	Defence Lawyer	Bosanski Samač	13/11/2017
19	Victims' Association	Brčko	14/11/2017
20	State Representative	Brčko	14/11/2017
21	Independent expert with professional experience of working with Victims of SV of the conflict	Sarajevo	16/11/2017
22	Prosecutor	Eastern Sarajevo, RS	17/11/2017
23	Judge	Bihać, Federation	21/11/2017
24	Prosecutor	Bihać, Federation	21/11/2017
25	Prosecutor	RS	22/11/2017

Interview	Interviewee(s)	Location, BiH	Date
26	Victims' Association	Prijedor, RS	22/11/2017
27	Victims' Association	RS	23/11/2017
28	CSO, Director	Banja Luka, RS	23/11/2017
29	Victim who had testified before the ICTY	Prijedor, RS	23/11/2017
30	NGO, Director	Banja Luka, RS	24/11/2017
31	NGO Staff Member	Banja Luka, RS	24/11/2017
32	NGO Staff Member	Sarajevo	01/12/2017
33	IGO Staff Member	Sarajevo	01/12/2017
34	Victims' Association	Goražde, Federation, BiH	04/12/2017
35	NGO, Director	Sarajevo	07/12/2017
36	Prosecutor	Mostar	08/12/2017
37	Judge	Trebinje	08/12/2017
38	Judge Cantonal Court	Sarajevo	12/12/2017
39	Embassy Official UK Embassy	Sarajevo	13/12/2017

Interview	Interviewee(s)	Location, BiH	Date
40	NGO	Sarajevo	14/12/2017
41	NGO, Staff Member	Tuzla	15/12/2017
42	IGO, Staff Member, EU	Sarajevo	19/12/2017
43	Judges, War Crimes Chamber, Bosnian State Court (Two judges)	Sarajevo	20/12/2017
44	Individual currently working in an independent state institution with extensive work experience in IGOs	Sarajevo	20/12/2017
45	IGO, Senior Staff Member	Sarajevo	21/12/2017
46	IGO, Senior Staff Member	Sarajevo	21/12/2017
47	Independent with professional experience engaging with victim-witnesses in Srebrenica	Sarajevo	21/12/2017
48	Defence Lawyers (2)	Sarajevo	22/12/2017
49	Investigative Journalist	Sarajevo	22/12/2017
50	Independent lawyer	Sarajevo	22/12/2017
51	NGO (via Skype)	Sarajevo	18/01/2018

Interview: Judge, Residual Special Court for Sierra Leone, N. Ireland, 7 November 2018.

Annex III: Interview Template: The Hague

- **The Evolution and Practice of Early Release**

1. What were your first thoughts on UER at the Tribunal?

2. What do you think are the most important factors to consider in determining the grant of early release?

3. What would be the general attitude amongst judges/staff on the early release of prisoners?

4. On occasions where the Judges consulted were against early release do you know what their propositions about what should happen to the prisoner were?

5. Are you aware of any consideration given to establishing agreements with states where the convict returns to have a system in place for monitoring conditional release?

6. Do you think there would have been a value in establishing a practice of conditional release and a mechanism to monitor a grant of conditional release?

- **Purpose of Punishment**

7. What do you think are the purposes of imprisonment, within the context of international crimes?

8. In the sentencing determinations at the ICTY retribution is the most cited purpose of punishment, second is deterrence, followed by rehabilitation. Retribution is cited not as revenge or simply the rule of law but tied to the notion of the "moral condemnation of the wrongs committed'. To what extent can the stated purposes be reconciled with convicts been granted unconditional early release?

9. (a) To what extent is the prisoners' acknowledgement of the crimes and remorse considered as important to the demonstration of rehabilitation?

9. (b) What you think about the current process of determining a demonstration of rehabilitation?

- **Victims / Justice**

10. Do you know if witnesses and victims' communities are informed of early release decisions in advance? There is an option to do so in the PD but it is not mandatory.

11. Do you think, in retrospect, there should have been a consultation process with victims?

12. What impact, if any, do the views of the victims' communities and the wider general public have on how the Tribunal / Mechanism informs its work?

13. Where to you think the rights of victims end?

- **Redactions**

14. A number of decisions have substantial redactions. What impact do you feel, if any, these redactions have on how the decision is perceived by the general public reading it?

Annex IV: Interview Template: BiH

1. The practice, process and perception of Early Release at the ICTY/MICT

1.1. Can you remember how you first came to know about early release at the ICTY?

1.2. What were your immediate thoughts about early release?

1.3. How much do you know about the past process of early release at the ICTY and current process at its Residual Mechanism?

1.4. What do you think about these processes?

1.5. In deciding early release the President is required by the Statute and the RPE to take into account four factors: gravity of the crimes; cooperation with the prosecutor; treatment of similarly-situated prisoners; and a demonstration of rehabilitation.

1.5.1. How would you prioritise these statutory factors?
- which ones do you consider the most important?

1.5.2. If relevant - cooperation with prosecutor - only post-conviction or prior to conviction, which would have been considered at sentencing?

1.6. Other factors have been considered by former and the current President;- such as the ill-health of the perpetrator and/or a family member, family ties, the perpetrator's age, personal implications of early release for the perpetrator (for example their ability to get a job, re-integrate into society.

1.6.1. How would you prioritise these additional factors? - which do you think are important?

1.7. Are any of these factors that you think should not be considered for perpetrators of international crimes?

1.8. Are there other factors that you would consider important? If so, what ones and why?

1.9. How do you think rehabilitation should be demonstrated in order for a perpetrator to be granted early release?

1.9.1. Should remorse be considered as an indication of rehabilitation?

1.9.2. Should good behaviour in prison be considered as rehabilitation?

1.9.3. Should perpetrators of specific crimes, such as rape, be required to complete particular rehabilitative programmes?

2. Purpose of punishment

2.1. What do you think are the purposes of punishment, within the context of international crimes?

2.2. In the sentencing determinations at the ICTY retribution is the most cited purpose of punishment, second is deterrence, followed by rehabilitation. Retribution is cited not as revenge but tied to the notion of the "moral condemnation of the wrongs committed".

2.2.1. How would you prioritise these purposes of punishment?

2.3. To what extent can the stated purpose of retribution - moral condemnation of crimes - be squared/matched/reconciled with perpetrators been granted unconditional early release?

3. Personal perspective

3.1. How has the practice of granting unconditional early release to perpetrators, generally after having served two thirds of their sentence, affected how you perceive the ICTY and its Residual Mechanism?

4. Victims' and survivors' perspectives

4.1. How do victims and survivors in general, those who haven't testified in The Hague, find out about the early release of perpetrators?

4.2. What do victims and survivors, in general, know about the process of early release at the ICTY/MICT?

4.3. How do you think victims and survivors in general feel about the process of early release?
4. 3.1. What factors do you think shape their opinion?
4.3.2. Are there multiple opinions?
4.3.3. Do these opinions on early release divide victims and survivors?

4.4. What do you think of the argument that regardless of early release victims' and survivors' communities would be unsatisfied with the ICTY's sentencing practice?

4.5. Do you think victims and survivors should have been considered while making the decision on early release?

4.6. Do you think victims and survivors should have been consulted in the process of early release?

5. National practice

5.1 What do you know about the practice of parole in BiH?

5.2. Do you know if the law on the execution of criminal sanctions was influenced by the ICTY's practice of granting early release generally after a perpetrator has served two-thirds of his/her sentence?

5.3. Do you know if the law on parole at the state and entity levels was shaped by other factors, such as International experts involved in drafting legislation?

6. Redactions from the public decisions on the grant of early release

6.1. Do you think people read these early release decisions?

6.2. What impact do you feel, if any, these redactions have on how the decision is perceived by the person reading it?

6.3. Redactions about the perpetrators' right to privacy - what do you think about this?

7. Conditional early release

7.1 Do you think it would have made a difference if conditions had been attached to their early release (restrictions placed on them for the duration of their sentence) - such as no talking to the media; a statement of remorse?